



XINGFEI LUO  
PO BOX 4886,  
El Monte, CA 91734

Petitioner in Pro Se

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

XINGFEI LUO,  
  
Petitioner,  
  
v.  
  
THE PEOPLE OF THE STATE OF  
CALIFORNIA  
  
Respondent.

No. 8:22-CV-01640-MEMF-KES

**REPLY IN SUPPORT OF FIRST  
AMENDED PETITION FOR WRIT OF  
HABEAS CORPUS**

Action filed: September 6, 2022

Xingfei Luo (Petitioner) respectfully submits the following reply in support of her First Amended Petition for writ of habeas corpus. ECF 33.

**I. PETITIONER’S PREVIOUSLY UNEXHAUSTED CLAIMS RAISED  
IN HER SECOND STATE HABEAS PETITION ARE NOT  
PROCEDURALLY BARRED AS SUCCESSIVE CLAIMS**

Whenever a second or subsequent habeas petition is filed, the Supreme Court engaged in the following **two-step analysis** to assess application of the procedural bar on successive claims. First, the court would determine whether the petitioner who filed a second or subsequent petition had "adequately justified his or her failure to present his or her claims in an earlier petition." *In re Friend* (2021) 11 Cal.5th 720, 728, 280 Cal.Rptr.3d

1 313, 489 P.3d 309 (*Friend*).

2 Before considering the merits of a second or successive petition, a California court  
3 will first ask whether the failure to present the claims underlying the new petition in a  
4 prior petition has been adequately explained, and whether that explanation justifies the  
5 piecemeal presentation of the petitioner's claims. This requirement is reasonable in view  
6 of the interest of the state in carrying out its judgments, the interest of the respondent in  
7 having the ability to respond to the petition and to retry the case should the judgment be  
8 invalidated, and the burden on the judicial system. *In re Clark*, 5 Cal.4th 750, 775 (Cal.  
9 1993) (*Clark*).

10 The Orange County Superior Court failed to follow the two-step analysis set forth  
11 by Supreme Court. First, under section 15 of her second state habeas petition, Petitioner  
12 does explain for the delay that she received ineffective assistance of counsel. ECF 51-1 at  
13 6. And it's unquestionable that Petitioner received no assistance of counsel for her habeas  
14 petitions.

15 Second, assuming the Orange County Superior Court's acknowledgement is true  
16 that Petitioner (without assistance of counsel) does not explain why she is filing a second,  
17 similar petition for writ of habeas corpus one year after filing her previous petition,  
18 Petitioner was not given any meaningful opportunity to provide explanation despite all it  
19 took was to issue an order to show cause and ask Petitioner to explain. ECF 51-2 at 4-5.  
20 The rejection of Petitioner's second state habeas petition by the Orange County Superior  
21 Court is not grounded in a reasoned assessment that Petitioner's rationale fails to warrant  
22 the incremental submission of claims. This is because the superior court lacks knowledge  
23 of the specifics of Petitioner's explanations. Luo Decl., ¶¶ 2-6. Such rejection constitutes a  
24 violation of Petitioner's due process rights.

25 A petitioner will be expected to demonstrate due diligence in pursuing potential  
26 claims. If a petitioner had reason to suspect that a basis for habeas corpus relief was  
27 available, but did nothing to promptly confirm those suspicions, that failure must be  
28 justified. However, where the factual basis for a claim was unknown to the petitioner and

1 he had no reason to believe that the claim might be made, or where the petitioner was  
2 unable to present his claim, the court will continue to consider the merits of the claim if  
3 asserted **as promptly as reasonably possible**. *Clark*, supra, 5 Cal.4th 750, 775.

4 "[A]dequate justifications include the inability to bring the claim earlier," such as  
5 where the claim depends on newly available evidence, on certain changes in the law, or on  
6 **ineffective assistance of prior counsel**. *Friend*, supra, 11 Cal.5th at pp. 728, 731. If  
7 counsel failed to afford adequate representation in a prior habeas corpus application, that  
8 failure may be offered in explanation and justification of the need to file another petition.  
9 *Clark*, supra, 5 Cal.4th 780. Courts will look to what petitioner and/or his counsel knew at  
10 the time of the appeal or the filing of the first habeas corpus petition, and demand that the  
11 failure to raise all issues in a single, timely petition be justified. In limited circumstances,  
12 consideration may be given to a claim that prior habeas corpus counsel did not  
13 competently represent a petitioner. *Clark*, supra, 5 Cal.4th 750, 779.

14 Claims 7, 8, 25, 26, 28, and 29 were pre-screened as unexhausted. ECF 12 at 12.  
15 Those claims are grounded on newly discovered legal theories rather than newly  
16 discovered facts. Petitioner, without assistance of counsel, has demonstrated her due  
17 diligence and she has presented all claims reasonably known to her at the time of the filing  
18 of her first state habeas petition. There is no incentive for her to abuse writ practice by  
19 delaying the second state petition. Luo Decl., ¶¶ 2-5. The delay was simply because  
20 Petitioner, without any prior legal training, was unable to develop and present her claims  
21 all at once within her capacity. See *People v. Bermudez* (1989) 215 Cal.App.3d 1226,  
22 1228–1230, 264 Cal.Rptr. 60 [assuming without deciding delay attributable to  
23 unrepresented defendant's ignorance of the law was "excusable"].

24 A prisoner who has knowledge of the facts upon which he believes that he is  
25 entitled to relief must explain any delay in seeking relief. *In re Shipp*, 62 Cal.2d 547, 553  
26 [43 Cal.Rptr. 3, 399 P.2d 571]. He may rely on counsel who then represents him to  
27 include the claim in a petition to be filed by counsel if he has alerted counsel to the issue.  
28 If he is not represented by counsel, he need not "develop" the legal theory on which the

1 claim is based, but must fully and fairly state the facts which underlie the claim for relief.  
2 *In re Swain* (1949) 34 Cal.2d 300, 304 [209 P.2d 793]. Here, Petitioner is not represented  
3 by counsel, she fully and fairly stated the facts which underlie the claims for relief both in  
4 her first and second state habeas petitions.

5 "In the rare instance in which the petitioner [was] able to adequately justify not  
6 having raised the claim earlier, the successiveness bar [did] not apply." *Friend*, supra, 11  
7 Cal.5th at p. 728. The successiveness bar does not apply here due to Petitioner's adequate  
8 justification.

9 If there is no adequate justification for the petitioner's failure to raise the claim  
10 earlier, the court proceeds to the second step of the analysis. *Friend*, supra, 11 Cal.5th at  
11 p. 728. At that step, the court must generally apply the successiveness bar to preclude  
12 consideration of the claim. But there is narrow exception for claims alleging "facts  
13 demonstrating that a fundamental miscarriage of justice has occurred." *Clark*, supra, 5  
14 Cal.4th at p. 775, 21 Cal.Rptr.2d 509, 855 P.2d 729. "In *Clark*, [the California Supreme  
15 Court] identified four situations in which the fundamental miscarriage exception is  
16 satisfied: (1) a highly prejudicial error of constitutional magnitude; (2) the petitioner's  
17 actual innocence; (3) presentation in a capital trial of a grossly misleading and highly  
18 prejudicial profile of the petitioner; or (4) conviction or sentencing under an invalid  
19 statute." *Friend*, supra, 11 Cal.5th at p. 728. If the petitioner could not show that the claim  
20 qualified for consideration under the fundamental miscarriage of justice exception, the  
21 claim was barred as successive. *Ibid*.

22 As the Supreme Court explained, "the successiveness bar was 'designed to ensure  
23 legitimate claims [were] pressed early in the legal process,' " and it operated to preclude  
24 "consideration of claims that were **unjustifiably omitted from earlier petitions**" while  
25 providing " 'a "safety valve" for those rare or unusual claims that could not reasonably  
26 have been raised at an earlier time.' " *Friend*, supra, 11 Cal.5th at p. 728.

27 The Orange County Superior Court failed the second step of the analysis. ECF 51-2  
28 at 4-5. The Superior Court did not consider whether Petitioner has made a showing that

1 would bring the claim within this four-part fundamental miscarriage exception. (1) highly  
2 prejudicial errors of constitutional magnitude: Introduction of perjured testimony, offered  
3 by the State with knowledge of their falsity (claim 7 and claim 8), Introduction of  
4 Inadmissible Evidence (claim 25), Permitting amendment to complaint one day before  
5 trial (claim 26), denial of motion to dismiss and *Marsden* motion (claim 28 and claim 29),  
6 and Improper Jury Instructions (claim 35). (2) the petitioner's actual innocence: Petitioner  
7 has presented clear and convincing evidence that the complaining witness is a compulsive  
8 liar. He cheats on his wife, his customers, his taxes, his income, and almost everyone  
9 crossed path with him. (3) presentation in a trial of a grossly misleading and highly  
10 prejudicial profile of the petitioner: due to defense counsel's failure to investigate,  
11 prosecution's withholding of exculpatory evidence, and introduction of perjury and  
12 inadmissible evidence, Petitioner was portrayed in a grossly misleading and highly  
13 prejudicial manner. (4) conviction or sentencing under an invalid statute: Petitioner has  
14 shown by clear and convincing evidence that her conviction and sentence were under  
15 invalid and unlawful restraining orders.

16 Federal courts retain the authority to issue the writ of habeas corpus in a further,  
17 narrow class of cases despite a petitioner's failure to show cause for a procedural default.  
18 These are extraordinary instances when a constitutional violation probably has caused the  
19 conviction of one innocent of the crime. This class of cases is described as implicating a  
20 fundamental miscarriage of justice. *McCleskey v. Zant* (1991) 499 U.S. 467, 494 [113  
21 L.Ed.2d 517, 111 S.Ct. 1454]. In *Murray v. Carrier*, 477 U.S. 478, 495, 496 (1986), the  
22 Court ruled that the concept of "fundamental miscarriage of justice" applies to those cases  
23 in which the defendant was "**probably** . . . actually innocent."

24 Under the rule for federal practice announced in *McCleskey*, the petitioner will bear  
25 the burden, once the government pleads abuse of the writ, to disprove abuse by showing  
26 cause for the failure to raise his claims in an earlier petition and prejudice therefrom.  
27 Here, Respondent did not plead abuse of the writ, Petitioner need not disprove abuse by  
28 showing cause for the failure to raise her claims in an earlier petition and prejudice

1 therefrom.

2 In conclusion, Petitioner's lack of assistance of counsel adequately justified for her  
3 failure to raise all claims previously. Even if Petitioner failed to provide adequate  
4 justification for her failure to raise the claim earlier, Petitioner has made a showing that  
5 she brought the claims within the four-part fundamental miscarriage exception. In  
6 addition, a petitioner can demonstrate a fundamental miscarriage of justice by  
7 "establishing] that under the probative evidence he has a colorable claim of factual  
8 innocence." *Sawyer v. Whitley*, 505 U.S. 333, 339-40, 112 S.Ct. 2514, 120 L.Ed.2d 269  
9 (1992) (quotation marks omitted).

10 This Court's refusal to hear Petitioner's claims even though the state court rejected  
11 them on independent and adequate state grounds would result in a fundamental  
12 miscarriage of justice. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 749-750 (1991);  
13 *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011); *Luckett v. Matteson*, No. 18-cv-  
14 07670-HSG (PR), 2020 WL 6868834, at \*9, 11 (2020).

## 15 II. PETITIONER'S CLAIMS ARE NOT PROCEDURALLY BARRED 16 FROM FEDERAL HABEAS REVIEW

17 In *Dixon*, the California Supreme Court held that, in order to bring a claim in a  
18 state habeas corpus action, a petitioner must first, if possible, have pursued the claims **on**  
19 **direct appeal** from his or her conviction unless the claim falls within certain exceptions.  
20 See *Park v. California*, 202 F.3d 1146, 1151 (9th Cir. 2000). The exceptions are: (1)  
21 fundamental constitutional error; (2) lack of jurisdiction over the petitioner; (3) the trial  
22 court acting in excess of its jurisdiction; or (4) an intervening change in the law. See *Park*,  
23 202 F.3d at 1152 (listing the exceptions to the *Dixon* rule as set forth by the California  
24 Supreme Court in *In re Harris*, 5 Cal. 4th 813, 828 n.7 (1993)). Because Petitioner's  
25 claims are fundamental constitutional errors and plain errors<sup>1</sup>, *Dixon* does not bar her  
26 claims.

27  
28 <sup>1</sup> When a party fails to object to jury instructions before jury deliberations begin, a "plain error" standard of review must be applied. E.g., *United States v. Ward*, 914 F.2d 1340, 1344 (9th Cir.1990).

1 In all cases in which a state prisoner has defaulted his federal claims in state court  
 2 pursuant to an independent and adequate state procedural rule, federal habeas review of  
 3 the claims is barred unless the prisoner can demonstrate cause for the default and actual  
 4 prejudice as a result of the alleged violation of federal law, or demonstrate that failure to  
 5 consider the claims will result in a fundamental miscarriage of justice. *Coleman v.*  
 6 *Thompson*, 501 U.S. 722, 750 (1991).

#### 7 Cause For The Default

8 Petitioner received ineffective assistance of counsel both at trial and on direct  
 9 appeal. As *Coleman* recognized, an attorney's errors during an appeal on direct review  
 10 may provide cause to excuse a procedural default; for if the attorney appointed by the  
 11 State to pursue the direct appeal is ineffective, the prisoner has been denied fair process  
 12 and the opportunity to comply with the State's procedures and obtain an adjudication on  
 13 the merits of his claims. See 501 U.S., at 754, 111 S.Ct. 2546; *Evitts v. Lucey*, 469 U.S.  
 14 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Douglas v. California*, 372 U.S. 353,  
 15 357-358, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

#### 16 Actual Prejudice

17 The right to the effective assistance of counsel at trial is a bedrock principle in our  
 18 justice system. It is deemed as an “obvious truth” the idea that “any person haled into  
 19 court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is  
 20 provided for him.” *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799  
 21 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense  
 22 counsel tests the prosecution's case to ensure that the proceedings serve the function of  
 23 adjudicating guilt or innocence, while protecting the rights of the person charged. See,  
 24 e.g., *Powell v. Alabama*, 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (“[The  
 25 defendant] requires the guiding hand of counsel at every step in the proceedings against  
 26 him. Without it, though he be not guilty, he faces the danger of conviction because he  
 27 does not know how to establish his innocence”). Effective trial counsel preserves claims  
 28 to be considered on appeal, see, e.g., Fed. Rule Crim. Proc. 52(b), and in federal habeas



1 proceedings, *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518  
 2 (2000).

3 When a petitioner is entirely deprived of an appellate procedure due to ineffective  
 4 assistance of counsel, prejudice is presumed. See *Dearinger ex ret. Volkova v. Reno*, 232  
 5 F.3d 1042, 1045 (9th Cir. 2000). Here, Petitioner's appellate counsel failed to raise any  
 6 issue on appeal and provided no substantive legal assistance whatsoever. Petitioner is  
 7 entitled to a presumption of prejudice. See *Ray v. Gonzales*, 439 F.3d 582, 589 (9th Cir.  
 8 2006) (Ray was entitled to a presumption of prejudice because his second attorney failed  
 9 to file a timely motion to reconsider or reopen and his third attorney provided no  
 10 substantive legal assistance whatsoever.)

11 The deficiencies in legal representation are not merely theoretical; they have  
 12 tangible consequences that substantially affected the outcome of the case leading to an  
 13 unjust conviction. If the contemporaneous objection rule bars Petitioner's claims despite  
 14 of the deficiencies in legal representation, the State can secure every conviction simply by  
 15 appointing incompetent counsel.

16 In conclusion, Petitioner was prevented from preserving her claims in both state  
 17 and federal habeas proceedings due to errors of her trial and appellate counsel, the errors  
 18 prejudice Petitioner and deprive her of the habeas proceedings entirely.

19 Federal Review Is Necessary To Prevent A Fundamental Miscarriage of Justice

20 Regardless of how overwhelming the evidence of guilt may be, the denial of a  
 21 fundamental right . . . is a miscarriage of justice. . . ." *People v. Modesto* (1963) 59 Cal.2d  
 22 722, 730 [31 Cal.Rptr. 225, 382 P.2d 33]; see also *People v. Seden* (1974) 10 Cal.3d 703,  
 23 720 [112 Cal.Rptr. 1, 518 P.2d 913].

24 A conviction based on insufficient evidence violates a defendant's due process  
 25 rights. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). See also  
 26 *People v. Blanco*, 10 Cal.App.4th 1167, 1173, 13 Cal.Rptr.2d 176 (Cal.Ct.App. 1992)  
 27 (considering due process claim despite lack of proper objection at trial). Evidence is  
 28 insufficient if, viewed in the light most favorable to the prosecution, no reasonable trier of



fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"A habeas petitioner challenging his state criminal conviction under 28 U.S.C. § 2254 based on sufficiency of the evidence 'is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' " *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir.2002). The Fourteenth Amendment requires that the evidence has been sufficient to persuade the factfinder beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *Jackson* holds that the writ of habeas corpus is available to assure state compliance with this fundamental constitutional requirement. 443 U.S. at 319-20, 99 S.Ct. at 2789-90.

Petitioner has made colorable showing of factual innocence as to the guilt stage of her trial. The alleged constitutional errors not only precluded the development of true facts but also resulted in the admission of false ones which affect the reliability of the guilt determination. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

### **CLAIM 1 - Prosecution of Dissemination of A Nudist's Nude Photos**

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), § 2254 habeas petitions "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim — (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see also *Lockyer v. Andrade*, 538 U.S. 63, 70-73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

#### Unreasonable Application of Clearly Established Federal Law

1 Respondent contends that California Penal Code, section 647 (j)(4)(A) is not  
2 unconstitutional in general under the First Amendment. However, Petitioner did not allege  
3 the statute itself violated her First Amendment rights.

4 A "legitimate" expectation of privacy by definition means more than a subjective  
5 expectation of not being discovered. *United States v. Jacobsen*, 466 U.S. 109, 123 n.22  
6 (1984). See also *Robbins v. California*, 453 U.S. 420, 428 (1981) (plurality opinion)  
7 ("Expectations of privacy are established by general social norms.")

8 Under exacting scrutiny, the Government may regulate protected speech only if  
9 such regulation promotes a compelling interest and is the least restrictive means to further  
10 the articulated interest. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115,  
11 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

12 Respondent did not and cannot articulate any compelling interest in enforcing  
13 California Penal Code, section 647 (j)(4)(A) in the context of the dissemination of a  
14 nudist's nude photos (taken on the naturalist beach in public), sent by the nudist to a  
15 stranger during a period of his infidelity without any legitimate expectation of privacy.

16 In conclusion, Petitioner's conviction involved an unreasonable application of  
17 clearly established federal law.

18 Unreasonable Determination of The Facts In Light of The Evidence Presented

19 When a petitioner challenges a state court's factual findings based on evidence in  
20 the state record, habeas relief is warranted only if "any appellate court to whom the defect  
21 is pointed out would be unreasonable in holding that the state court's fact-finding process  
22 was adequate." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). Although this is a  
23 "daunting standard," *id.*, it can be met when the state courts "plainly misapprehend or  
24 misstate the record in making their findings, and the misapprehension goes to a material  
25 factual issue that is central to the petitioner's claim," *id.* at 1001, or where "the state court  
26 has before it, yet **apparently ignores, evidence that supports petitioner's claim**," *id.*  
27 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003)). In addition "[t]o fatally  
28 undermine the state fact-finding process, and [to] render the resulting finding

1 unreasonable, the overlooked or ignored evidence must be highly probative and central to  
2 petitioner's claim." *Id.*

3 Respondent made no attempt to argue the determination of the facts was reasonable  
4 by citing evidence. Instead, Respondent simply repeated the superior court's opinion that  
5 the jury rejected Petitioner's argument. (RT 282-283.)

6 The nature of the interaction between Czodor and Petitioner was notably limited.  
7 Petitioner and Czodor met only once when Czodor sent his nude photos to Petitioner. RT  
8 144. There was no indication of a continuing or meaningful connection between them.  
9 Petitioner never told Czodor her real name. RT 130. Even after they met the second time,  
10 Czodor didn't even know if a dating relationship started. RT 134. Given the absence of  
11 personal identification and the minimal contact between the parties, it is unreasonable to  
12 assert that Czodor held a legitimate expectation of privacy in the nude photos he sent to  
13 Petitioner. The act of voluntarily sharing sensitive content with a total stranger, such as  
14 nude photos, implies a degree of assumed risk and a waiver of privacy. Czodor's decision  
15 to share such intimate material without establishing a more substantial connection  
16 weakens the argument for a reasonable expectation of privacy. The lack of physical  
17 evidence, such as text messages indicating his expectation of privacy, his request to keep  
18 his photos private, and Petitioner's agreement to keep his photos private, further supports  
19 the unreasonable determination of Czodor's expectation of privacy and the parties'  
20 agreement to keep the photos private. CT p. 147. See *Jeffries v. Wood*, 114 F.3d 1484,  
21 1500 (9th Cir. 1997) ( en banc) (holding that a state court's factual decision is  
22 unreasonable if the decision is "clearly incorrect.") Simply put, Czodor's expectation of  
23 privacy in his nude photos sent to Petitioner and the parties' agreement to keep the images  
24 private are not supported by the record.

25 In addition, Respondent purposefully omits the facts that the jury did not hear:  
26 Czodor was married at the time he made contact with Petitioner, Czodor was raised as a  
27 nudist, Czodor has prior criminal conviction rested upon dishonesty, Czodor's wife is ten  
28 years senior than him, Czodor was arrested for impersonation, and Czodor was subject to

1 deportation. Had the jury heard those facts, no reasonable jury would find Czodor is a  
2 decent person who had a legitimate expectation of privacy in his nude photos.

3 One of the core principles of nudism is body positivity, which involves accepting  
4 and appreciating one's body as it is. Nudists aim to promote a healthier body image by  
5 normalizing nudity and reducing the stigma surrounding the naked human form. By  
6 willingly shedding their clothing, nudists challenge societal norms and advocate for body  
7 acceptance.

8 According to the legal doctrine of reasonable expectation of privacy, a person's  
9 privacy rights are only violated if they have a subjective expectation of privacy that  
10 society recognizes as reasonable. In other words, a person's privacy rights depend on the  
11 context and circumstances of the situation. In the context of nudism, the conventional  
12 notion of privacy in naked photos can be seen as contradictory, as it suggests a need to  
13 hide or conceal the very thing nudists celebrate.

14 Nudists believe that going nude allows them to express themselves authentically  
15 and break free from societal expectations and constraints. Naked skin is nudists' clothing.  
16 By being naked, they feel liberated and empowered to embrace their true selves. In this  
17 context, the expectation of privacy in naked photos contradicts the very purpose of  
18 nudism, which is to share and celebrate their bodies without shame or inhibition.

19 Nudists believe that by exposing their bodies, they create an atmosphere of trust  
20 and vulnerability, facilitating meaningful connections with others. Consequently, the  
21 sharing of naked photos within this context can be viewed as an extension of this  
22 communal bond, where privacy expectations may be different from mainstream social  
23 norms.

24 While nudism is a lifestyle centered around body positivity and self-expression, it  
25 is highly possible for individuals within nudist communities to exploit the societal  
26 discomfort around nudity by falsely claiming an expectation of privacy in their naked  
27 photos.

28 Nudism is founded upon the principles of openness, acceptance, and a willingness

1 to share one's naked body. By claiming an expectation of privacy in naked photos, nudists  
2 contradict their own philosophy of embracing nudity as a form of self-expression and  
3 body acceptance.

4 It is essential to maintain a critical perspective and consider the broader  
5 implications when evaluating the authenticity of privacy claims made by nudists or  
6 anyone else in similar contexts. While nudism promotes body positivity, self-expression,  
7 and a sense of freedom from societal norms, it is important to recognize that there can be  
8 instances where individuals may attempt to manipulate the legal system to their  
9 advantage.

10 Married individuals have an existing commitment to their spouse, which involves  
11 maintaining trust and fidelity in their relationship. Infidelity inherently involves a breach  
12 of trust and a violation of the commitment made within a marriage. In the context of  
13 infidelity, the absence of an established intimate relationship with the person to whom the  
14 naked photos are sent further diminishes the expectation of privacy. The lack of emotional  
15 and physical intimacy suggests that the sender did not expect the same level of  
16 responsibility in maintaining privacy as one would expect within a committed  
17 relationship.

18 By engaging in extramarital activities, including sending unsolicited naked photos  
19 to someone other than his spouse, a married nudist demonstrates a lack of regard for the  
20 expectations of privacy within the confines of his marriage. By sending unsolicited naked  
21 photos to someone other than his spouse, a married nudist is voluntarily disclosing his  
22 images to a third party in the absence of established intimacy. This act itself suggests no  
23 expectation of privacy, as he has chosen to share these images with someone outside the  
24 boundaries of his marriage. The breach of trust in marriage, the absence of established  
25 intimacy with a third party, and the voluntary disclosure, contribute to the significantly  
26 diminished expectation of privacy when it comes to unsolicited naked photos shared  
27 during infidelity.

28 **CLAIM 2 - Lack of Dating Relationship**

1 An absence of jurisdiction in the convicting courts is a basis for federal habeas  
2 corpus relief cognizable under the due process clause. See, e.g., *Lowery v. Estelle*, 696  
3 F.2d 333, 337 (5th Cir. 1983) (state court jurisdiction); cf. *Schlomann v. Moseley*, 457  
4 F.2d 1223, 1227 (10th Cir. 1972) (military court martial), cert. denied, 413 U.S. 919, 93  
5 S.Ct. 3068, 37 L.Ed.2d 1041 (1973).

6 As explained in Section I and II, Claim 2 is not procedurally barred.

7 Petitioner did not assert exclusivity or an intention to pursue a serious courtship as  
8 criteria for qualifying as a dating relationship. Instead, Czodor's concealment of his  
9 marriage serves as evidence that he either lacked or did not intend to establish frequent  
10 and intimate associations with Petitioner. The encounter between Czodor and Petitioner  
11 was a married man's casual hook-up instead of dating relationship.

12 In arguing Czodor and Petitioner had a dating relationship, Respondent  
13 purposefully ignored Czodor's own admission: Who are you to me? .... Jesus Christ. I  
14 met you one or two times. CT p. 101. Actually I don't even know if a dating relationship  
15 started. RT 134.

16 During their entire encounter, Petitioner never told Czodor her real name or full  
17 name. RT 130 and ECF 6 at 155. Two individuals met in person only twice, a limited and  
18 casual interaction that does not align with the frequency typically associated with dating  
19 relationships. The communication between the parties was limited to a three-week texting  
20 exchange. While communication is a factor in relationships, the brevity and nature of the  
21 interaction do not establish the kind of intimate association contemplated by the statutory  
22 definition. Interpreting such limited interactions as constituting a dating relationship has  
23 the potential to overextend the application of domestic violence statutes. This risk is  
24 particularly acute when individuals casually meet, especially if one party conceals  
25 important information such as marital status. These facts make clear that the nature of the  
26 association between Czodor and Petitioner was neither frequent nor intimate as a dating  
27 relationship under DVPA.

28 Respondent also argues that the trier of fact may draw its own inferences and

1 conclusions from the evidence and has the “power to factually find a ‘dating relationship’  
2 within the meaning of the DVPA even though the parties characterize their relationship as  
3 a friendship that does not involve ‘dating’ as that term is commonly understood.”

4 "Dating" commonly refers to a social activity where two individuals spend time  
5 together, typically in a romantic or potentially romantic context, with the aim of getting to  
6 know each other better. It often involves activities such as going out to dinner, seeing a  
7 movie, attending events, or engaging in other shared experiences. Dating is a phase in  
8 which individuals explore mutual interests, values, and compatibility to determine if they  
9 want to pursue a more serious and exclusive romantic relationship. The nature and  
10 expectations of dating can vary widely based on cultural, personal, and societal factors.

11 While common dating involves various levels of intimacy, the statutory definition  
12 specifically emphasizes the frequency and intimacy of associations as key components of  
13 a dating relationship. The legal standard requires a certain level of intensity beyond what  
14 may be present in casual or occasional dating. The statutory definition explicitly  
15 highlights the expectation of affection or sexual involvement as essential criteria for a  
16 dating relationship. This goes beyond the common understanding of dating, adding a  
17 specific legal requirement that may not be present in all romantic or social interactions.

18 At trial, the jury was never given the statutory definition of dating relationship. See  
19 Claim 12. The jury was never asked to determine whether Czodor and Petitioner had a  
20 dating relationship within the meaning defined by DVPA. The determination of a dating  
21 relationship between Czodor and Petitioner is unreasonable and not supported by the  
22 record.

23 Relief may be permitted by challenging the substance of the state court's factual  
24 findings and showing that those findings were not supported by substantial evidence on  
25 the record. *Hibbler v. Bendetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). A petitioner can also  
26 attempt to show that the state court's fact-finding process itself was materially deficient.  
27 *Id.* Irrespective of the type of challenge, a petitioner must establish that the state court's  
28 decision was not merely incorrect, but objectively unreasonable. *Id.*; *Stanley v. Cullen*,



1 633 F.3d 852, 859 (9th Cir. 2011).

2 A state court's factual findings are unreasonable if a federal appellate panel,  
3 applying the normal standards of review, could not reasonably conclude that the finding is  
4 supported by the record. *Id.*; *Pizzuto v. Yordy*, 947 F.3d 510, 523 (9th Cir. 2019).

5 If reasonable minds reviewing the record could disagree, the state court factual  
6 determinations are not unreasonable. See, e.g., *Brumfield v. Cain*, 576 U.S. 305, 314  
7 (2015); *Pizzuto v. Yordy*, 947 F.3d 510, 523 (9th Cir. 2019).

8 No reasonable mind would consider a married man concealing his marriage to have  
9 had a dating relationship with a woman he met only twice when she never disclosed her  
10 name, applying the general principles of dating relationships and the reasonable  
11 expectations in such circumstances.

### 12 **CLAIM 3 - Blanket Prohibition of speech on all contents**

13 Petitioner never authorized her trial counsel to stipulate with prosecution as to the  
14 lawfulness of the restraining orders. Prior to signing off the stipulation, public defender  
15 never discussed with Petitioner about the stipulation which indicates a serious breakdown  
16 in communications. Public defender's action deprived Petitioner of her right to participate  
17 in the making of decisions on her own behalf. The stipulation with prosecution  
18 demonstrates that Petitioner's trial counsel was grossly incompetent.

19 An injunction, if upon its face it abridges rights guaranteed by the First  
20 Amendment, should be struck down. *United Transportation Union v. Michigan Bar*, 401  
21 U.S. 576, 581 (1971). "So the -- by the rules of the restraining order, if she posted a post  
22 that said, like, hey, Tomas Czodor, he's a nice guy, that's a violation of the restraining  
23 order." ECF 4 at 194-195. The prosecution already identified the unconstitutionality of the  
24 restraining order.

25 Respondent made no attempt to demonstrate any compelling interest or the  
26 restraining order are the least restrictive means to further the articulated interest.

27 The Orange County Superior Court identified certain legal principles and authority.  
28 However, it failed to apply any factual analysis to these laws. Namely, the superior court

1 made no analysis at all.

2 The TRO issued on Sep 28, 2018 orders Petitioner to remove content from pages  
3 on internet what she or her accomplices created to destroy Czodor's online reputation and  
4 to stop posting about Czodor online. A defamation injunction, if allowed at all, can only  
5 forbid republication of the precise statements proven defamatory at trial. Respondent did  
6 not and cannot articulate what content was proven defamatory. Nor did Respondent  
7 explain how requiring Petitioner to stop posting about Czodor online is constitutional.

8 Item 23 of the DVRO issued on Oct 19, 2018 provides that Petitioner is ordered to  
9 cease posting the picture or likeness of Czodor or refer to him by name on **any** social  
10 media website or blog. Petitioner is further ordered to remove **any** pictures or references  
11 of Czodor from **any** social media website or blog she may have posted. Respondent did  
12 not and cannot articulate how these broad terms are constitutional.

13 Just as the prosecution admitted, "So the -- by the rules of the restraining order, if  
14 she posted a post that said, like, hey, Tomas Czodor, he's a nice guy, that's a violation of  
15 the restraining order." RT pp. 293-294. The prosecution has articulated why the  
16 restraining orders are unconstitutional.

17 Both restraining orders should have been struck down under clearly established  
18 federal law.

19 **CLAIM 4 - Withholding of Sep 10, 2018 Police Field Activity Report**

20 In a case lacking physical and forensic evidence and the complaining witness is the  
21 only testifying witness, any evidence related to the credibility of the witness is material.  
22 See, e.g., *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)  
23 (finding violation because "the Government's case depended almost entirely" on the  
24 cooperating witness's testimony, making impeachment crucial); *Carriger v. Stewart*, 132  
25 F.3d 463, 480 (9th Cir. 1997) (finding violation because lack of corroborating evidence at  
26 trial made impeachment evidence material). Evidence that would show bias, motive to lie  
27 or exaggerate, or dishonesty of the witness is within the scope of *Brady*.

28 On September 10, 2018 at 14:34 Czodor reported and Santa Ana Police recorded

1 “THREATNING TO COME TO HIS RESD AT 2521 N JACARANDA AND 242 HIM.”  
2 ECF 6 at 200.<sup>2</sup>

3 A summary report indicates that Czodor called the police on September 10, 2018  
4 for only one time. ECF 6 at 202.

5 The Appellate Division of the Orange County Superior Court’s conclusion that  
6 nothing in the document supports Czodor was the source of the reference to “a terrorism  
7 report” in that document is plainly incorrect.

8 Czodor testified that after discovering his nude photos online, he informed the  
9 petitioner that he would involve the police. He visited the police station on September 7,  
10 2018, but it was closed. According to his testimony, he contacted the police the following  
11 week about the incident. RT 150-151.

12 However, the police field activity report on September 10, 2018, indicates a call  
13 from Czodor reporting unfounded terrorism, rather than the alleged incident of the  
14 distribution of nude photos. ECF 6 at 200.

15 The inconsistency between Czodor’s testimony and the content of the September  
16 10, 2018, police field activity report raises questions about the accuracy of the information  
17 provided. If Petitioner had indeed posted Czodor’s nude photos online, one would expect  
18 the police report to document this incident rather than referencing unfounded terrorism.

19 The email correspondence on September 24, 2018, with Guaranteed Removals  
20 introduces the possibility that Czodor may have contemplated fabricating revenge porn  
21 allegations to get even. This is particularly relevant given that he expressed seeking  
22 criminal charges after learning that removing online content related to his extramarital  
23 encounter would incur costs and potentially expose him to his spouse.

24 The withholding of the September 10, 2018, police field activity report has the  
25 potential to significantly alter the narrative surrounding the alleged distribution of  
26 Czodor’s nude photos given the fact that all paper documentary evidence presented at trial  
27 lack forensic examination. The inconsistency with Czodor’s testimony and the timing of

---

28 <sup>2</sup> 2521 N JACARANDA ST is Czodor’s residence. ECF 6 at 177.

1 subsequent actions raises questions about the credibility and motivations involved in this  
2 case. Had the report been disclosed, trial counsel might have pursued different lines of  
3 inquiry, seeking additional evidence or exploring avenues to challenge Czodor's  
4 credibility, therefore it would have changed the outcome of the trial.

5 The Appellate Division of the Orange County Superior Court's conclusion that the  
6 disclosure of the September 10, 2018 report could not reasonably have resulted in a  
7 different outcome at trial is contravened established federal law.

8 **CLAIM 5 - Withholding of Sep 10, 2018 Police Field Activity Report**

9 The Sep 18, 2018 Police Field Activity report would have changed the outcome of  
10 the trial. Had the report been disclosed, trial counsel might have pursued different lines of  
11 inquiry, seeking additional evidence or exploring avenues to challenge Czodor's  
12 credibility.

13 During the trial, a video taken by Czodor's cell phone on September 18, 2018, at  
14 19:54 (ECF 6 at 157) was presented to the jury, alleging that Petitioner scratched his door.  
15 While the video was taken, Czodor was outside of his house. RT 158. Czodor made a call  
16 to the police at 20:09 on the same night, reporting that Petitioner was knocking on his  
17 door. ECF 6 at 201. Czodor alleged that Petitioner scratched his door for 20 minutes and  
18 did not stop after he told her to. ECF 6 at 155 and 170; RT 213. If Czodor was able to tell  
19 Petitioner to stop scratching his door, it is implausible that he could not tell the police on  
20 the phone about the scratching or be unaware of the damage on the same night.

21 However, during this call and the subsequent police response, Czodor did not  
22 mention that Petitioner had allegedly scratched his door. ECF 6 at 201.

23 If the scratching had occurred and recorded by the video, there was a 15-minute  
24 window between the video and the phone call in which Czodor could have informed the  
25 police, yet he did not do so. If the scratching had occurred and Petitioner did not stop after  
26 being told by Czodor, Czodor could have informed the police about the scratching before  
27 the police left, yet he did not do so. Where was Czodor in the 15-minute window?

28 The area in front of Czodor's front door was brightly lit, and he had access to his

1 cell phone throughout the night when Petitioner scratched his door for 20 minutes. If the  
2 scratching had occurred as alleged, he would have had ample opportunity to discover and  
3 record the damage. However, the video provided as evidence lasts less than one minute,  
4 showing only the sound of knocking instead of scratching.

5 The September 18, 2018 police field activity report is crucial in verifying the  
6 accuracy of Czodor's allegations. It would document the events surrounding Czodor's  
7 allegations, shedding light on the sequence of events and the veracity of the vandalism  
8 claim.

9 The appellate division emphasized the scratches found on Czodor's door the day  
10 after Petitioner repeatedly knocked on it but ignored overwhelming evidence showing that  
11 if the scratching had occurred, it is inconceivable that Czodor didn't see or know it while it  
12 was happening or Czodor would not have discovered before he called the police or  
13 Czodor was not initially aware that Petitioner had damaged his door on the night of the  
14 incident. RT 168.

15 The email correspondence on September 24, 2018, with Guaranteed Removals  
16 introduces the possibility that Czodor may have scratched his own door and contemplated  
17 fabricating vandalism allegations to get even. This is particularly relevant given that he  
18 expressed seeking criminal charges after learning that removing online content related to  
19 his extramarital encounter would incur costs and potentially expose him to his spouse.  
20 This is consistent with the fact that the photo of the damaged door was taken on  
21 September 25, 2018. ECF 6 at 172. If the scratching had occurred on September 18, 2018,  
22 and Czodor discovered the damages on September 19, 2018, what was the reason he  
23 waited until September 25, 2018, right after he discovered the costs to remove online  
24 content related to his extramarital encounter, to take the photo of the damaged door?

25 The September 18, 2018 police filed activity report exposed the inconsistencies in  
26 the timing of events and Czodor's theory.

### 27 **CLAIM 6 - Withholding Czodor's Prior Conviction**

28 The withholding of Czodor's prior conviction significantly affected the defense

1 counsel's ability to formulate an effective discovery strategy and assess the credibility of  
2 the prosecution's sole witness.

3 The appellate division minimized the importance of Czodor's criminal conviction  
4 by noting that it occurred more than ten years ago. However, this timeline may have  
5 influenced the prosecution's decision-making process, possibly contributing to their  
6 reluctance to bring the case to trial and their repeated attempts to continue the trial beyond  
7 the ten-year mark. Furthermore, Czodor's credibility, being the prosecution's sole witness  
8 in a case lacking physical and independent evidence, is of paramount importance. His  
9 prior conviction, which was based on dishonesty, is particularly relevant to the assessment  
10 of his credibility.

11 Had Czodor's prior conviction been disclosed, trial counsel might have pursued  
12 different lines of inquiry, seeking additional evidence or exploring avenues to challenge  
13 Czodor's credibility, therefore it would have changed the outcome of the trial.

14 The appellate division's downplaying of the significance of Czodor's prior  
15 conviction and the subsequent withholding of this information has far-reaching  
16 implications on the trial proceedings and defense counsel's discovery strategy. It not only  
17 raises questions about the prosecution's motives and trial strategy but also underscores the  
18 importance of Czodor's credibility in the absence of physical and independent evidence.

19 **CLAIM 7 - Perjured Testimony/False evidence – report to police the**  
20 **following week after Sep 7, 2018**

21 As explained in Section I and II, this claim is not procedurally barred.

22 First, Czodor's testimony was actually false. Czodor testified that after discovering  
23 his nude photos online, he informed Petitioner that he would involve the police. He visited  
24 the police station on September 7, 2018, but it was closed. According to his testimony, he  
25 contacted the police the following week about the incident. RT 150-151. However, the  
26 police field activity report on September 10, 2018, indicates a call from Czodor reporting  
27 unfounded terrorism, rather than the alleged incident of the distribution of nude photos.  
28 ECF 6 at 200.

1 Second, the prosecution knew or should have known that Czodor's testimony was  
2 actually false. The police field activity report September 10, 2018 has been in possession  
3 of the State.

4 And third, Czodor's testimony was material. If Petitioner had posted Czodor's  
5 nude photos online between September 5 and September 7 (RT 140-151), Czodor's  
6 contact with police on September 10, 2018 made no mention of any nude photos which  
7 strongly indicates that Czodor was not telling the truth and the revenge porn allegation  
8 may have been fabricated.

9 **CLAIM 8 - Perjured Testimony/False evidence – It was dark on Sep 18, 2018**

10 As explained in Section I and II, this claim is not procedurally barred.

11 First, Czodor testified that he did not see the damage Petitioner had caused to his  
12 door on the night of September 18th until the next day. RT 168. The only possible reason  
13 was dark, same as he testified in the family court "It was dark there. I couldn't see it."  
14 ECF 6 at 171. The inference from Czodor's testimony "In the dark of the night" was  
15 actually false. The photo, ECF 6 at 159, shows light showering Petitioner from head to toe  
16 in front of Czodor's front door.

17 Second, the prosecution knew or should have known that Czodor's testimony was  
18 actually false. The photo, ECF 6 at 159, showing Czodor's front door area brightly lit, was  
19 in possession of the prosecution and presented at trial. RT 169-170.

20 And third, whether it was dark was material. It is inconceivable that Czodor could  
21 capture a well-lit photograph of his front door and Petitioner and yet remain unaware of  
22 the damage to the door on the same night.

23 **CLAIM 9 – UNLAWFUL INTRODUCTION AND**  
24 **MISREPRESENTATION OF PETITIONER'S PRIOR**  
25 **INVOLUNTARY TESTIMONY**

26 As explained in Section I and II, this claim is not procedurally barred.

27 Petitioner did not assert she had a federal right to counsel at a civil proceeding.  
28 Instead, Petitioner contends that absent protection from self-incrimination, if she was



1 nevertheless compelled to answer, her answers are inadmissible against her in a later  
2 criminal prosecution. ECF 33 at 50.

3 Respondent contends that the October 19, 2018 family court proceeding was not  
4 part of a police investigation into a particular crime, and occurred before any prosecution  
5 was initiated. However, Respondent failed to demonstrate that Petitioner's testimony  
6 during the October 19, 2018 family court proceeding was voluntary. Respondent also  
7 failed to respond to Petitioner's argument that absent privilege protection, if she was  
8 nevertheless compelled to answer, her answers are inadmissible against her in a later  
9 criminal prosecution. *Bram v. United States*, 168 U.S. 532, 542—543, 18 S.Ct. 183,  
10 186—187, 42 L.Ed. 568 (1897); *Boyd v. United States*, 116 U.S. 616, 634, 637—638, 6  
11 S.Ct. 524, 534, 536—537, 29 L.Ed. 746 (1886).

12 Respondent asserts that Petitioner does not contend that she attempted to invoke  
13 her constitutional privilege against self-incrimination and was prevented from doing so in  
14 the civil proceedings. Petitioner, representing herself, faced limitations in informatively  
15 invoking her constitutional privilege against self-incrimination due to the lack of legal  
16 representation. A person cannot attempt to exercise a right if they are unaware of their  
17 ability to do so. The absence of personal counsel forced Petitioner to directly answer  
18 questions in family court and prevented her from asserting her available constitutional  
19 privilege because she was not informed to do so.

20 Intention to waive the privilege against self-incrimination is not "lightly to be  
21 inferred" and that vague and uncertain evidence will not support a finding of waiver.  
22 *Smith v. United States*, 337 U.S. 137, 150, relying on *Johnson v. Zerbst*, 304 U.S. 458,  
23 464, and cases there cited. In the case of this petitioner, there is no evidence that she  
24 intended to give up her privilege of silence in family court. Later in the criminal  
25 prosecution while being represented by public defender Petitioner informatively asserted  
26 the privilege against self-incrimination.

27 Respondent contends that Petitioner's guilt of the charged offenses was  
28 independently established through direct testimony, documentary evidence of Petitioner's

1 incriminating texts and online activity, as well as recorded adoptive admissions made  
2 voluntarily by her to Czodor. Petitioner will address each of them in turn.

3 Direct testimony: Petitioner has provided overwhelming evidence showing that  
4 Czodor is a compulsive liar and Czodor's direct testimony is false and inconsistent.  
5 Overwhelming evidence shows Czodor has a strong motive to lie, exaggerate, and  
6 manufacture evidence. Despite of his enduring marriage, Czodor consistently presented  
7 himself during the trial as a single, innocent individual seeking a dating relationship. RT  
8 199. Czodor's one man show at trial demonstrates he is a skilled manipulator.

9 Documentary evidence: All documentary evidence presented at trial was in paper  
10 form without metadata or forensic examination. They were provided by Czodor instead of  
11 being collected by police through forensic technology. They were unreliable given the fact  
12 that Czodor is not credible. The omission of metadata or forensic evidence was  
13 particularly significant given there was only one testifying witness at trial.

14 Recorded adoptive admissions: The video allegedly with adoptive admissions is  
15 incomplete and manipulated. In the recorded video Czodor asked "Did you send my naked  
16 pictures to my customers on Yelp. Huh?" ECF 3 at 115. At trial, Czodor testified that  
17 Lilly was the person who reviewed his company and received the naked video. RT 160.  
18 However, none of Czodor's customers on Yelp had a name "Lilly." Lilly was never called  
19 to testify whether she received any videos. In the recorded video Czodor asked "Did you  
20 send, **Chris, come over here**. Unbelievable this one. Did you send Chris my Yelp site?  
21 Send him naked videos of me, huh?" ECF 3 at 115. Chris was never interviewed by public  
22 defender. ECF 33 at 108. Chris was never called to testify regarding the naked videos and  
23 the completeness of the conversation took place on September 18, 2018.

24 It is a settled principle of the administration of criminal justice that a conviction  
25 must rest upon firmer ground than the uncorroborated admission or confession of the  
26 accused. Criminal confessions and admissions of guilt require extrinsic corroboration.  
27 *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963). Petitioner's adoptive admissions  
28 do not furnish competent or credible corroborative evidence, such as forensic evidence.

1 Petitioner's trial counsel never bothered to interview several key witnesses, he  
2 could not possibly have made professionally responsible decisions regarding which  
3 witnesses to call and which evidence to introduce.

4 Overwhelming evidence shows that the videos are just Czodor's another  
5 manipulation. Same as Petitioner's act of knocking on his door was fabricated as  
6 scratching his door. Petitioner's convictions are completely unreliable.

7 **CLAIM 10 – IAC – FAILURE TO INVESTIGATE AND CROSS-**  
8 **EXAMINE**

9 "[C]ounsel has a duty to make reasonable investigations or to make a reasonable  
10 decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466  
11 U.S. 668, 691 (1984). "A lawyer who fails adequately to investigate, and to introduce into  
12 evidence, [information] that demonstrates his client's factual innocence, or that raises  
13 sufficient doubts as to that question to undermine confidence in the verdict, renders  
14 deficient performance." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006)  
15 (quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) (brackets in Lord)). In that  
16 same vein, we have held that "[f]ailure to investigate possible exculpatory witnesses can  
17 be ineffective assistance." *United States v. Mendoza*, 107 F.3d 878, 1997 WL 97279, at \*1  
18 (9th Cir. Mar. 4, 1997) (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1456-58, 1461 (9th Cir.  
19 1994)); see also *United States v. Tucker*, 716 F.2d 576, 583 (9th Cir. 1983) (failure to  
20 even attempt to interview key prosecution witnesses constitutes deficient performance).

21 In *People v. Pope*, 23 Cal.3d 412 (Cal. 1979), the court suggests that if counsel was  
22 asked for an explanation and failed to provide one, this could prove he or she had no  
23 tactical reason for the action taken. Despite Petitioner repeatedly asked public defender  
24 with respect to the approach they took (or didn't take) in the handling of Petitioner's case  
25 #19CM06724, no explanation was ever given. ECF 6 at 206-209. Trial counsel had been  
26 given the chance to explain, they failed to point to any information justifying the strategic  
27 decision. The state court's decision is unreasonable that Petitioner has not shown the  
28 record contains affirmative evidence that counsel had no "rational tactical purpose" for an

1 action or omission.

2 In denying Petitioner's first state habeas petition, the superior court identified  
3 certain legal principles and authority. However, it failed to apply any factual analysis to  
4 these laws. ECF 6 at 19-20. Namely, it failed to conduct any evaluation.

5 First prong: What is the objective standard of reasonableness under prevailing  
6 professional norms?

7 In 2023 the prosecution, based on the exact same old evidence, prosecuted  
8 Petitioner once again alleging Petitioner failed to remove Czodor's nude photos posted in  
9 2018, Case No.: **23CM00067**. ECF 45. The actions of defense counsel at trial in 2023 sets  
10 forth the objective standard of reasonableness.

11 Trial counsel's failure to at least interview Naomi, Lilly and Chris was inexcusable,  
12 as those witnesses might have discovered some of them are fictitious individuals and  
13 exposed Czodor's lies. These "multiple deficiencies have the cumulative effect of denying  
14 a fair trial" to Petitioner. *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979).

15 Second prong: Is there a reasonable probability the result of the proceeding would  
16 have been different?

17 Definitely yes.

18 Czodor's testimony reads as follow:

19 ECF 4 at 101:

20 Q And from the first time you started talking to  
21 her to your second date, how long was that time period?

22 A First date to second date I would say one and  
23 a half week, two weeks. One and a half week. Yeah.

24 Q And you sent her nude photos, correct?

25 A Yes. Correct.

26 .....(ECF 4 at 105):

27 Q Have you sent naked pictures to other people  
28 that you didn't meet online?

1 A No, I was not.

2 Q I'm sorry. What was that?

3 A No, I did not.

4 **Q So you would say you've only sent naked**  
5 **pictures to only one person; is that correct?**

6 **A Yes. That's correct.**

7 As of 2018, Czodor had a marriage of almost 10 years. He never sent his naked  
8 pictures to his wife but he sent his naked pictures to Petitioner, a woman he just met once?

9 Czodor's testimony, as presented, appears to strain credibility given the significant  
10 duration of his marriage. The principle of common experience and human behavior,  
11 suggest that it is inherently implausible for an individual in a nearly decade-long marriage  
12 to have never exchanged intimate photographs with their spouse. This line of reasoning  
13 does not necessarily challenge the admissibility of evidence but seeks to undermine the  
14 credibility of a key witness, who is also the sole witness in this case.

15 The claimed absence of intimate photo exchanges within a marital relationship is  
16 so implausible that it warrants skepticism and consideration in evaluating the overall  
17 credibility of Czodor's statements. The jury should have had the opportunity to assess the  
18 believability of Czodor's testimony regarding sending naked pictures to only Petitioner  
19 while maintaining that he had never done so within his long-term marriage. The inherent  
20 implausibility of this assertion is presented as a factor that should be considered in  
21 assessing the reliability and credibility of the witness's testimony.

22 The boldness of the false narrative is presented as evidence of a pattern of deceit,  
23 demonstrating Czodor as a compulsive liar and skillful manipulator, and suggesting a  
24 calculated attempt to deceive and manipulate the proceedings.

25 The failure to discovery Czodor's marriage significantly prejudiced Petitioner  
26 beyond a reasonable doubt.

27 In addition, Case No. 23CM00067 constitutes a new trial of the same matters  
28 addressed in Case No. 19CM06724. In a surprising turn of events, Petitioner was

1 acquitted, even after Petitioner's 2021 conviction was disclosed to the jury.

2 **CLAIM 11 – IAC – FAILURE TO PRESENT MATERIAL FACTS**

3 The court should take into consideration that Respondent misrepresents the  
4 evidence by asserting that Czodor's email shows he would need to pay to remove nude  
5 photos. ECF 50-1 at 42. In actuality, Czodor was attempting to address a post labeling him  
6 as a liar. ECF 6 at 165.

7 In *People v. Pope*, 23 Cal.3d 412 (Cal. 1979), the court suggests that if counsel was  
8 asked for an explanation and failed to provide one, this could prove he or she had no  
9 tactical reason for the action taken. Despite Petitioner repeatedly asked public defender  
10 with respect to the approach they took (or didn't take) in the handling of Petitioner's case  
11 #19CM06724, no explanation was ever given. ECF 6 at 206-209.

12 As explained in Claim 1, whether Czodor was a "nudist" had a reasonable  
13 probability of altering the outcome of the trial because Czodor, who was raised as a  
14 nudist, was in fact attempting to exploit the societal discomfort around nudity by falsely  
15 claiming an expectation of privacy in his naked photos.

16 In addition, whether Czodor was a nudist also goes to the element "Defendant  
17 distributed the image and knew or should have known that distribution of the image or  
18 images would cause the person depicted serious emotional distress." Due to her  
19 knowledge of Czodor as a nudist, Petitioner could not know or should not have known  
20 that distribution of the image or images would cause the person depicted serious  
21 emotional distress because of her understanding of nudism, as explained in Claim 1. The  
22 prosecution failed to prove this element beyond a reasonable doubt.

23 Respondent contends that Petitioner provides no persuasive argument on the  
24 relevance of evidence that Czodor would have to pay to have his private photos removed  
25 from the internet. This argument is grounded on the false assumption that Czodor  
26 attempted to pay to have his private photos removed. In fact, in Czodor's September 24,  
27 2018 email, what he requested to remove from the internet was simply comments about  
28 his credibility instead of his private photos. ECF 6 at 165. Upon discovering the cost of

1 removing comments affecting his credibility and becoming incensed by the expenses and  
2 the potential risk of being discovered by his wife, he proceeded to fabricate criminal  
3 charges to get even. This is particularly true when considering the timeline and sequence  
4 of all the events (the September 10, 2018 police field activity report and the photo of the  
5 damaged door taken on September 25, 2018). On September 26, 2018, the police officer  
6 wrote “Czodor provided me with a list of a few of the social media outlets baring the  
7 videos and photographs of his genitalia, however, upon checking these websites there  
8 were no photographs or video's depicting Czodor's genitalia.” ECF 6 at 178. The  
9 September 24, 2018 email reveals Czodor’s motive to manufacture criminal charges.

10 The failure to unveil crucial information regarding Czodor's marital status has  
11 significantly prejudiced Petitioner. The role of Czodor's wife remains ambiguous, adding  
12 an additional layer of doubt to the case. Czodor's extramarital affair might have been  
13 discovered by his wife. In an attempt to portray himself as innocent, Czodor fabricated  
14 multiple allegations against Petitioner to appease his spouse. These facts are material to  
15 Czodor's motive to lie, and the failure to uncover these details constitutes ineffective  
16 assistance of counsel.

17 The failure to address material facts related to Czodor's marital situation, coupled  
18 with the failure to present Czodor’s nudist upbringings, raises concerns about the  
19 adequacy of legal representation.

#### 20 **CLAIM 12 – IAC – FAILURE TO REQUEST JURY INSTRUCTION**

21 First, Petitioner never authorized her trial counsel to stipulate with prosecution as  
22 to the lawfulness of the restraining orders. Prior to signing off the stipulation, public  
23 defender never discussed with Petitioner about the stipulation which indicates a serious  
24 breakdown in communications. Public defender’s action deprived Petitioner of her right to  
25 participate in the making of decisions on her own behalf. The stipulation with prosecution  
26 demonstrates that Petitioner’s trial counsel was grossly incompetent.

27 As explained in Claim 2, two casual dates with a man who concealed his marriage  
28 status do not form any dating relationship defined by DVPA.



1 Petitioner did not confuse the requirements for issuing a DVRO and the elements  
2 required for conviction of unlawfully distributing private images.

3 In order to convict, the prosecution is obligated to establish, beyond a reasonable  
4 doubt, that “defendant received or acquired the image or images of the other person under  
5 circumstances in which the defendant and the other person agreed or understood that the  
6 images shall remain private.”

7 As explained in Claim 1, it is difficult to see how Czodor would have a reasonable  
8 expectation of privacy in pictures sent to a stranger, a woman he just met once.

9 In the absence of a genuine dating relationship, there is no inherent understanding  
10 or agreement between Petitioner and Czodor that the images would be treated as private.  
11 The nature of their interaction does not establish the necessary circumstances for such an  
12 agreement.

13 **CLAIM 13 – IAC – NO RATIONAL TACTICAL PURPOSE TO SIGN**  
14 **OFF A STIPULATION WITH PROSECUTION**

15 In *People v. Pope*, 23 Cal.3d 412 (Cal. 1979), the court suggests that if counsel was  
16 asked for an explanation and failed to provide one, this could prove he or she had no  
17 tactical reason for the action taken. Despite Petitioner repeatedly asked public defender  
18 with respect to the approach they took (or didn’t take) in the handling of Petitioner’s case  
19 #19CM06724, no explanation was ever given. ECF 6 at 206-209.

20 Trial counsel had no rational tactical purpose for the decision to enter into the  
21 stipulation because he failed to provide one. The appellate division’s decision is  
22 unreasonable that Petitioner had failed to show from the record “that counsel had no  
23 rational tactical purpose” for the decision to enter into the stipulation.

24 Respondent contends that trial counsel’s decision to enter a more limited  
25 stipulation regarding their validity and terms appears to be a calculated strategy to  
26 preclude admission of these exhibits. This is completely false. In order to convict, the  
27 prosecution is obligated to establish, beyond a reasonable doubt, that the restraining orders  
28 were lawfully issued. The stipulation effectively did prosecution a favor and the

1 preclusion of these exhibits serves no rational tactical purpose. No competent lawyer  
2 would have chosen to sign a stipulation while the restraining orders are invalid and  
3 unconstitutional. See Claim 2 and Claim 3.

4 First prong: What is the objective standard of reasonableness under prevailing  
5 professional norms?

6 In 2023 the prosecution, based on the exact same old evidence, prosecuted  
7 Petitioner once again alleging Petitioner failed to remove Czodor's nude photos posted in  
8 2018, Case No.: **23CM00067**. ECF 45. The actions of defense counsel at trial in 2023 sets  
9 forth the objective standard of reasonableness.

10 Second prong: Is there a reasonable probability the result of the proceeding would  
11 have been different?

12 Definitely yes. Essentially, Case No. 23CM00067 constitutes a new trial of the  
13 same matters addressed in Case No. 19CM06724. In a surprising turn of events, Petitioner  
14 was acquitted, even after Petitioner's 2021 conviction was disclosed to the jury.

15 **CLAIM 14 – IAC – FAILURE TO EXCLUDE PRIOR COMPELLED**  
16 **TESTIMONY**

17 Defense counsel moved through the motion in limine to exclude all statements  
18 made by Petitioner in all the civil restraining order hearings, based on California Evidence  
19 codes 352 and 400 instead of Fifth Amendment. ECF Doc. 3 at 93 [CT 80].

20 As explained in Claim 9, Petitioner's testimony in a family court proceeding was  
21 involuntary and her answers are inadmissible against her in a later criminal prosecution.

22 Defense counsel's failure to preserve federal law issue was inexcusable.

23 **CLAIM 15 – IAC – FAILURE TO EXPOSE PERJURED**  
24 **TESTIMONY**

25 On October 19, 2018, Czodor testified under oath, "IT WAS DARK THERE. I  
26 COULDN'T SEE IT. WHEN I SEE IT, I SEE IT AFTERWARDS WHEN WE OPENED  
27 THE DOOR, AND YOU LEFT." ECF 6 at 171. Trial counsel received the family court  
28 transcript before trial. At trial, when being asked if he saw Petitioner scratch his door,

1 Czodor testified “No, I wasn't seeing her<sup>3</sup>. If I see her, I report it to the police. ... I took a  
2 photo of her with the key.” ECF 6 at 159.

3 Any competent counsel, in possession of the family court transcript and the  
4 photograph depicting Petitioner holding a key in front of Czodor's door, would likely raise  
5 inquiries about why the front door was well-lit, yet no damage was discovered, despite  
6 Czodor's claim that Petitioner had scratched his front door for 20 minutes. Additionally,  
7 questions would arise about Czodor's misrepresentation of the lighting conditions during  
8 family court proceedings. The only reason Czodor lied about the lighting is he lied about  
9 the scratching of his door.

10 **CLAIM 16 – IAC – FAILURE TO DISCOVER INCONSISTENT**  
11 **STATEMENTS**

12 After petitioner was convicted, she requested and received the entire discovery file  
13 from public defender. ECF 33 at 105. Petitioner has direct personal knowledge of what  
14 investigation counsel did or did not do.

15 Respondent tactically admits that Czodor’s testimony is directly contracted to the  
16 September 10, 2018 police filed activity report, leaving the IAC obvious.

17 While the front door area was well-lit, after 20 minutes of alleged scratching and  
18 video-taping the scratching, the absence of any contemporaneous allegations made on the  
19 scene meaningfully impacted the determination of her guilt or innocence of vandalism.

20 The front door area was adequately illuminated, providing a conducive  
21 environment for observation and assessment. It is illogical for Czodor to have produced a  
22 video purportedly demonstrating the act of vandalism, yet he purportedly failed to report  
23 the incident promptly to the police at the scene. The act of filming a video, presumably  
24 capturing the vandalism, implies a level of awareness and engagement with the alleged  
25 offense. If Czodor had the presence of mind to record the incident, it is asserted that he  
26 should have also been capable of promptly reporting the vandalism to law enforcement

---

27  
28 <sup>3</sup> The only possible reason that Czodor could not see Petitioner scratch his door was dark. The prosecution’s  
comment “in the dark of night” was drawn from Czodor’s family court testimony.

1 authorities.

2 The incongruity between providing a video as evidence and the failure to report the  
3 vandalism on the spot raises questions about the credibility and consistency of Czodor's  
4 account. It is argued that the logical course of action for an individual who witnesses or  
5 captures evidence of a crime, such as vandalism, would be to promptly notify the police to  
6 ensure timely intervention and investigation.

7 This temporal gap between the occurrence of the alleged scratching and the  
8 subsequent reporting introduces an element of doubt regarding the authenticity of the  
9 events as portrayed.

#### 10 **CLAIM 17: IAC – FAILURE TO OBJECT**

11 In *People v. Pope*, 23 Cal.3d 412 (Cal. 1979), the court suggests that if counsel was  
12 asked for an explanation and failed to provide one, this could prove he or she had no  
13 tactical reason for the action taken. Despite Petitioner repeatedly asked public defender  
14 with respect to the approach they took (or didn't take) in the handling of Petitioner's case  
15 #19CM06724, no explanation was ever given. ECF 6 at 206-209.

16 In order to prevail on her ineffective assistance of counsel claim, Petitioner need  
17 not prove conclusively that the trial court would have sustained counsel's objections.  
18 Rather, Petitioner must demonstrate only a "reasonable probability" that she would have  
19 prevailed had it been raised by his trial counsel. *Carrera v. Ayers*, 699 F.3d 1104, 1108  
20 (9th Cir.2012) (en banc).

21 A delivery driver, uncompensated for jury duty, resides with his father who was  
22 laid off from work, asserts facing financial hardship and explicitly told the court that "I  
23 have anxiety" and "I can't really miss work." The trial court asked if either counsel would  
24 want to be heard as to that particular juror and defense counsel submitted the issue to the  
25 Court. ECF 4 at 4-5.

26 The juror's explicit statement expressing anxiety and difficulty in missing work,  
27 coupled with the backdrop of financial hardship, this combination of factors constitutes a  
28 valid basis for a legitimate concern regarding the juror's ability to impartially fulfill his

1 duties. The juror's economic circumstances and the explicit communication of anxiety and  
2 hardship create a reasonable probability that the court would consider dismissal. The  
3 availability of two alternative jurors was a key factor supporting the proposition that the  
4 court could dismiss the juror without undermining the trial process. The presence of  
5 alternative jurors mitigates any potential disruption to the proceedings, ensuring that the  
6 juror's dismissal would not jeopardize the fairness of the trial. The failure of the defense  
7 counsel to raise the issue and seek the dismissal of the juror was a missed opportunity to  
8 address a valid concern which constitutes ineffective assistance of counsel.

9 **CLAIM 18: IAC – Failure to bring the case to a speedy trial**

10 In *People v. Pope*, 23 Cal.3d 412 (Cal. 1979), the court suggests that if counsel was  
11 asked for an explanation and failed to provide one, this could prove he or she had no  
12 tactical reason for the action taken. Despite Petitioner repeatedly asked public defender  
13 with respect to the approach they took (or didn't take) in the handling of Petitioner's case  
14 #19CM06724, no explanation was ever given. ECF 6 at 206-209.

15 The record contains affirmative evidence that counsel had "no rational tactical  
16 purpose" for the delay of the trial because during the pendency of the case, defense  
17 counsel did no investigation (see claims 10-12, 15-16).

18 Defense counsel's failure to investigate and prepare for trial indicates that no  
19 additional time was actually needed.

20 1) There is no evidence supporting that Petitioner personally and voluntarily  
21 waived her speedy trial rights; 2) the delay was attributable to negligent conduct by the  
22 government (the trial court's failure to manage the calendar, the prosecution's failure to  
23 bring the case to trial; the public defender's failure to prepare the case to trial); the  
24 continuance requested by the defense was unreasonable due to the lack of investigation;  
25 the unavoidable delays from the pandemic were limited to 68 days (from March 24, 2020  
26 (initial trial date) to May 31, 2020 ECF 6 at 218); and 3) 720 days delay is presumed  
27 prejudice and the record suggests that Petitioner did not benefit from any of the  
28 continuance to prepare trial; in addition, the substantial delay caused Petitioner subject to

1 over \$20,000 interests from restitution. ECF 3 at 193. The state court's denial of  
2 Petitioner's IAC claim was objectively unreasonable.

3 **CLAIM 19: Unreasonable Determination of Facts**

4 See Claim 21.

5 **CLAIM 20: Insufficient Evidence – dating relationship**

6 *Jackson v. Virginia* establishes a two-step analysis for a challenge to the  
7 sufficiency of the evidence. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010)  
8 (en banc). "First, a reviewing court must consider the evidence in the light most favorable  
9 to the prosecution." *Id.* (citation omitted); see also *McDaniel v. Brown*, 558 U.S. 120, 133  
10 (2010). At this step, a court "may not usurp the role of the trier of fact by considering how  
11 it would have resolved the conflicts, made the inferences, or considered the evidence at  
12 trial." *United States v. Nevils*, 598 F.3d at 1164 (citation omitted). "Rather, when faced  
13 with a record of historical facts that supports conflicting inferences a reviewing court must  
14 presume - even if it does not affirmatively appear in the record - that the trier of fact  
15 resolved any such conflicts in favor of the prosecution, and must defer to that resolution."  
16 *Id.* (citations and internal quotations omitted); see also *Coleman v. Johnson*, 132 S. Ct. at  
17 2064 ("Jackson leaves [the trier of fact] broad discretion in deciding what inferences to  
18 draw from the evidence presented at trial, requiring only that [the trier of fact] draw  
19 reasonable inferences from basic facts to ultimate facts") (citation and internal quotations  
20 omitted); *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) ("it is the responsibility of the jury —  
21 not the court — to decide what conclusions should be drawn from evidence admitted at  
22 trial"). The State need not rebut all reasonable interpretations of the evidence or "rule out  
23 every hypothesis except that of guilt beyond a reasonable doubt at the first step of Jackson  
24 [v. Virginia]." *United States v. Nevils*, 598 F.3d at 1164 (citation and internal quotations  
25 omitted). Circumstantial evidence and the inferences drawn therefrom can be sufficient to  
26 sustain a conviction. *Ngo v. Giurbino*, 651 F.3d 1112, 1114-15 (9th Cir. 2011).

27 The Court must conduct an independent review of the record when a habeas  
28 petitioner challenges the sufficiency of the evidence. See *Jones v. Wood*, 114 F.3d 1002,

1 1008 (9th Cir. 1997).

2 At the second step, the court "must determine whether this evidence, so viewed, is  
3 adequate to allow **any rational trier of fact** to find the essential elements of the crime  
4 **beyond a reasonable doubt.**" *United States v. Nevils*, 598 F.3d at 1164 (citation and  
5 internal quotations omitted; original emphasis).

6 In applying these principles, a court looks to state law for the substantive elements  
7 of the criminal offense, but the minimum amount of evidence that the Constitution  
8 requires to prove the offense "is purely a matter of federal law." *Coleman v. Johnson*, 132  
9 S. Ct. at 2064.

10 The evidence was insufficient to establish a dating relationship between a married  
11 man and Petitioner.

12 **CLAIM 21: Insufficient Evidence – Expectation of Privacy**

13 Citing to no applicable legal authority<sup>4</sup>, Respondent asserts that an individual,  
14 engaged in a person-to-person text exchange, holds a reasonable expectation of privacy  
15 regarding nude photographs, presuming that these images would remain confidential  
16 beyond the intended recipient. Respondent's argument is grounded in a false assumption,  
17 specifically, that Czodor is not a nudist and that his relationship with the Petitioner was  
18 genuine.

19 In *Vanburen*, under almost identical circumstances, complainant sent naked  
20 pictures of herself to Mr. Coon<sup>5</sup> through Facebook Messenger<sup>6</sup> without any promise on his  
21 part to keep the pictures private, the court held that the facts that complainant and Mr.  
22 Coon apparently knew each other, had each other's contact information, and had a  
23 conversation about whether Mr. Coon was sleeping with defendant, are not sufficient to  
24 support an inference that she had a reasonable expectation of privacy. In sum, the State  
25 has not offered sufficient evidence to permit a jury to conclude beyond a reasonable doubt

26 <sup>4</sup> The cases cited by Respondent involves reasonable expectation of privacy free from government intrusion which is  
27 not the issue at hand. The cases cited by Respondent related to naked body do not apply to nudists.

28 <sup>5</sup> Mr. Coon was a person with whom complainant had a past but not present relationship.

<sup>6</sup> Facebook Messenger is an application that allows one Facebook user to privately send text messages to another Facebook user.



1 that complainant had a reasonable expectation of privacy in the photos she sent to Mr.  
2 Coon. *State v. Vanburen*, 214 A.3d 791 (Vt. 2019).

3 Respondent contends that Czodor's testimony, explaining that he sent Petitioner  
4 solicited nude photographs in a "private conversation" through a nonpublic person-to-  
5 person text message, and that he did not send them to anyone else or give her permission  
6 to disseminate them, if believed, was sufficient to support the conviction, and the  
7 resolution of any question as to his credibility was properly entrusted to the jury.

8 As explained in Claim 10, Czodor is a compulsive liar and master manipulator. His  
9 testimony explaining that he did not send his naked pictures to anyone else is perjury  
10 beyond a reasonable doubt.

11 The combination of Czodor's concealed marital status, nudist lifestyle, and the  
12 limited acquaintance with Petitioner diminishes any legitimate expectation of privacy in  
13 the exchanged photographs. Given the context of Czodor's actions, he cannot reasonably  
14 expect that such intimate images would remain private, especially when shared with  
15 someone he had minimal knowledge of and met on a single occasion. While there is no  
16 doubt Czodor's naked pictures went sent through text messages, the lack of text messages  
17 showing Czodor's request to keep his photos private or Petitioner's promise to keep his  
18 photos private further supports that Czodor had no reasonable expectation of privacy in  
19 the exchanged photos.

20 Finally, Respondent asserts that texts from Petitioner to Czodor explained that her  
21 actions in posting the photos were intended to provide him negative notoriety in order to  
22 make him "suffer," and she continued to spread them online after the victim asked her to  
23 stop, threatened to go to the police, and obtained a restraining order. First, the texts  
24 (ranging from September 4 to September 8, 2018) presented at trial in paper format were  
25 provided by Czodor instead of being forensically collected by police and therefore have  
26 serious authenticity issue. The genuineness of the texts remains at issue due to Czodor's  
27 pattern of deceit. Second, Respondent intentionally misrepresents the texts presented at  
28 trial because not a single word in the alleged texts from Petitioner mentioned posting the

1 photos. Third, given the time frame of the texts (ranging from September 4 to September  
2 8, 2018), if the texts from Petitioner had been related to posting naked photos, Czodor's  
3 September 10, 2018 police contact would have indicated that. ECF 6 at 200. The  
4 discrepancy between Czodor's contact with police on September 10, 2018 and the alleged  
5 threatening texts from Petitioner raises significant doubt on Czodor's testimony and  
6 genuineness of the threatening texts allegedly sent from Petitioner. This is also the exact  
7 reason why the September 10, 2018 police activity report was withheld.

8 Given the severity of the threat to distribute explicit photos, any reasonable person  
9 would have promptly reported such a threat to law enforcement, especially when they  
10 were already in direct contact with the police. If the threat to post naked photos was  
11 genuine and substantial, Czodor's failure to report it on September 10, 2018 when he had  
12 direct contact with the police is inherently suspicious. The absence of a timely report  
13 could be indicative of a lack of truthfulness in Czodor's claims. The only plausible  
14 explanation for Czodor's failure to inform the police about the threat on September 10,  
15 2018, is that he lied about being threatened to post his naked photos.

16 **CLAIM 22: Insufficient Evidence – Serious Emotional Distress**

17 As explained in Section I and II this claim is not procedurally barred.

18 Czodor suffered unpleasant grief, shame, humiliation, embarrassment, or worry  
19 that was not slight or negligible because his extramarital affair was exposed, rather than  
20 his nude photos were distributed given his nudist lifestyle.

21 The record here establishes that Czodor is a compulsive liar and master  
22 manipulator with a pattern of deceit. See Claim 10. Whether Naomi and Lilly are real  
23 persons remains puzzling, so as the authenticity of other paper evidence. See Claim 25. It  
24 is pure speculation that Czodor's nude photos were viewed by hundreds or thousands of  
25 strangers on "cheater" websites.

26 Respondent's reliance is misplaced on *People v. Iniguez* which presents a different  
27 set of facts and circumstances. In *Iniguez*, an image showing Fajardo's bare breasts—  
28 which she believed would never be seen by anyone other than defendant—was posted on

1 a Facebook page, and Fajardo now felt nothing between her and defendant could be  
2 hidden **from the public**. Fajardo was embarrassed, she worried about losing her job,  
3 believed she needed psychological help but lacked **the money for treatment**, and she felt  
4 so bad that she told her mother she wanted to “get in the car and go kill [herself].”

5 Here, there is no doubt that Czodor took his nude photos on public land, a beach.  
6 ECF 4 at 45-46. Czodor, as a nudist, has nothing to hide from the public.

7 If the distress were indeed severe and impactful, one would reasonably expect an  
8 individual to take prompt and proactive steps to address their emotional well-being. The  
9 decision not to seek professional assistance suggests a lack of urgency or severity in the  
10 emotional distress claimed by Czodor. Serious emotional distress typically entails a level  
11 of intensity and impact on an individual's well-being that may necessitate professional  
12 intervention. The failure to take such a step raises questions about the severity and  
13 immediacy of the emotional turmoil purportedly experienced. Unlike *Iniguez*, Czodor  
14 never testified that he lacked money for treatment as any treatment should be covered by  
15 health insurance. Nor did Czodor testify that he wanted to kill himself.

16 **CLAIM 23: Insufficient Evidence – Loss of Income**

17 Czodor's income pattern provides a contextual backdrop that raises questions about  
18 the veracity of his claim regarding the loss of reputation and his motive to lie for financial  
19 gain. Czodor's income pattern, when compared to his claim of loss of reputation, suggests  
20 a pattern of deceit, implying that inconsistencies in various aspects of Czodor's narrative  
21 that impacted the overall credibility of his testimony.

22 **CLAIM 24: Violation of due process – Improper form of evidence**

23 Respondent contends that this claim is not cognizable because Petitioner fails to  
24 allege a violation of federal law. The Supreme Court has instructed the federal courts to  
25 liberally construe the "inartful pleading" of pro se litigants. *Boag v. MacDougall*, 454 U.S.  
26 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982) (per curiam).

27 Although Petitioner did not explicitly allege a violation of federal law, the  
28 substance of her claims exhibits her argument of a violation of due process. Where a

1 simple fingerprint comparison can secure the release of an innocent person, it has been  
2 held, failure to conduct such a comparison constitutes a violation of due process, see *Lee*  
3 *v. City of L.A.*, 250 F.3d 668, 684 (9th Cir.2001), particularly where the putative  
4 “investigation” requires only review of “an easily available piece of physical evidence”  
5 already in the government's possession. *Russo v. City of Bridgeport*, 479 F.3d 196, 209,  
6 199 (2d Cir.2007). The failure to collect and preserve evidence that is potentially  
7 exculpatory may violate a defendant's due process rights if that failure was motivated by  
8 bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)  
9 (“[U]nless a criminal defendant can show bad faith on the part of the police, failure to  
10 preserve potentially useful evidence does not constitute a denial of due process of law.”);  
11 *Miller v. Vasquez*, 868 F.2d 1116, 1120 (9th Cir. 1989) (“[A] bad faith failure to collect  
12 potentially exculpatory evidence would violate the due process clause.”).

13 The failure to collect forensic evidence of all texts, screenshots, videos and  
14 Czodor’s phone is a clear violation of Petitioner’s due process rights. First, the texts,  
15 screenshots, videos and Czodor’s phone records were material beyond doubt. Evidence is  
16 material to a defendant's case if it “possess[es] an exculpatory value that was apparent  
17 before the evidence was destroyed, and [was] of such a nature that the defendant would be  
18 unable to obtain comparable evidence by other reasonably available means.” *California v.*  
19 *Trombetta*, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). There is no  
20 question that the evidence might have been exculpatory, since a forensic examination can  
21 reveal whether they are genuine and complete. A forensic examination could have  
22 supported Petitioner’s claim that the texts, screenshots, videos and Czodor’s phone  
23 records include exculpatory evidence. Moreover, the evidence sought was of such a nature  
24 that it was not reasonably available to the defendant. The incidents occurred in September  
25 2018. Defense counsel was not appointed until Petitioner’s arraignment on August 12,  
26 2019, and had no indication that a forensic examination might be integral to his client's  
27 case. Second, In 2018, forensic evidence was readily and wildly available. It’s common  
28 knowledge that texts, screenshot, photos, and videos are easy to manipulate. The

1 deliberate choice not to collect forensic evidence stems from the government's bad faith,  
2 supporting by the withholding of police activity reports on September 10 and 18, 2018.

3 **CLAIM 25: ADMISSION OF INADMISSIBLE HEARSAY**

4 *Dixon* did not bar this claim due to Petitioner's failure to raise this claim on direct  
5 appeal. Appellate counsel should have raised this claim on her behalf. *In re Smith* (1970)  
6 3 Cal.3d 192, 202-203 [appellate counsel may be deemed ineffective if she fails to raise  
7 potentially successful contentions on appeal].

8 Respondent contends that the conversations at issue consisted of informal text  
9 exchanges between friends and colleagues, and the primary purpose of these  
10 communications was to inform the victim of disparaging and explicit materials online for  
11 the sake of his wellbeing. However, "Testimonial statements are those made primarily to  
12 memorialize facts relating to past criminal activity, which could be used like trial  
13 testimony." *People v. Sanchez*, 63 Cal.4th 665, 689 (Cal. 2016). The text exchanges were  
14 offered at trial to support that Petitioner had distributed Czodor's nude photos to his  
15 friends and clients and the reason why the person who distributed them was Petitioner was  
16 Petitioner was the only person who received Czodor's nude photos. The primary purpose  
17 of the text exchanges is related to preserving facts for later use at trial. Lay opinion  
18 testimony may not convey or rely on hearsay, because it is not helpful to the jury. *United*  
19 *States v. Freeman*, 498 F.3d 893, 904-05 (9th Cir.2007).

20 In *Nielsen*, during his testimony, Agent Faycosh related how Roxanne Volz was  
21 asked during the course of the search who had access to the floor safe where the  
22 methamphetamine was found, and she replied that Nielsen did. The Ninth Circuit held that  
23 such testimonial out-of-court statements are prohibited under the Confrontation Clause  
24 unless the declarant witness is shown to be unavailable and the defendant had an earlier  
25 opportunity to cross-examine the declarant. *U.S. v. Nielsen*, 371 F.3d 574, 581 (9th Cir.  
26 2004).

27 Similar to *Nielsen*, Czodor's testimony reads as follows:

28 Q Okay. And can you -- can you describe to the

1 jury how you recognize what I showed you?

2 A So this is the text message from **my friend**

3 **Naomi Mateos** (phonetic) which one is on the -- on the

4 top.

5 .....

6 Q Yes. And you said this message you receive  
7 from your friend Naomi. Is there a photo in that  
8 message?

9 A Yes, it is.

10 Q What is the photo depicting?

11 A Of myself.

12 Q And can you elaborate on -- you recognize  
13 yourself in the photo.

14 A Yes. Correct.

15 Q Are you wearing any clothes in that photo?

16 A I don't.

17 Q Okay. Do you recall sending that photo to Ms.  
18 Luo at any point?

19 A Yes, I did.

20 Q Okay. Did you send that photo to Ms. Luo when  
21 you were still -- at the time you were still dating her?

22 A Yeah, that was between first and second date.

23 ..... (ECF 4 at 61)

24 Q And is that a screenshot that you took?

25 A No, I did not.

26 Q Okay.

27 A Tomas C is again pretending somebody. It's a  
28 fake account and **Lilly (phonetic) is the person who**

1 **review my company**<sup>7</sup> and Tomas C sent this video, which one  
2 was posted before on Facebook, on Instagram, or on  
3 YouTube, a bunch of different servers and one of the  
4 servers was Yelp and all the customers -- five customers  
5 that time I had there receive this video from Tomas C.  
6 But they was thinking it's me, but it was not me.

7 Q And so you -- the document I handed you like  
8 that shot from Yelp --

9 A Yes.

10 Q -- you've seen that before, correct?

11 A Yes, I did.

12 Q Okay.

13 A Yes.

14 Q And how did you first become aware it, did  
15 somebody notify you --

16 A Yes.

17 Q -- or send you a message?

18 A Correct, there my clients called and let me  
19 know.

20 Q Okay. And then through that you ended up  
21 seeing that message.

22 A Yes.

23 ..... (ECF 4 at 105)

24 Q Have you sent naked pictures to other people  
25 that you didn't meet online?

26 A No, I was not.

27 \_\_\_\_\_  
28 <sup>7</sup> On Czodor's company page on Yelp, Lilly was nowhere to be found. None of the people who reviewed Czodor's so-called company name Lilly.



1 Q I'm sorry. What was that?

2 A No, I did not.

3 Q So you would say you've only sent naked  
4 pictures to only one person; is that correct?

5 A Yes. That's correct.

6 The statements made by Czodor's friend and customer, as conveyed through his  
7 testimony, were offered for the truth of the matter asserted – namely, that disparaging and  
8 explicit materials were circulating online by Petitioner. As such, these statements carry a  
9 testimonial character, implicating the core concerns of the Confrontation Clause. The  
10 Supreme Court in *Crawford* emphasized that testimonial hearsay, absent confrontation  
11 and cross-examination, cannot be admitted without violating the defendant's constitutional  
12 rights.

13 In improperly permitting admission of the hearsay, the trial court reasoned that the  
14 communication is not being offered for the truth of the matter, but simply for the witness  
15 to explain in his mind what it is. This is untrue. The prosecution's theory is that Czodor, in  
16 his entire life until 2018 while he was 36 years old as a nudist, sent his nude photos to no  
17 one else but Petitioner and his friends and clients received his nude photos that he sent no  
18 one else but Petitioner. Czodor's nude photos must be sent by Petitioner to his friends and  
19 clients.

20 "Evidence erroneously admitted in violation of the Confrontation Clause must be  
21 shown harmless **beyond a reasonable doubt**, with courts considering the importance of  
22 the evidence, whether the evidence was cumulative, the presence of corroborating  
23 evidence, and the overall strength of the prosecution's case." *United States v. Bowman*,  
24 215 F.3d 951, 961 (9th Cir. 2000) (holding that introduction of co-conspirator's out-of-  
25 court statements was harmless considering the weight of the admissible evidence).

26 Considering the lack of forensic evidence and corroborating evidence, and  
27 complaining witness' motive to lie, the paper evidence is insufficient to prove that  
28 Petitioner distributed Czodor's nude photos beyond a reasonable doubt. It could be

1 Czodor's fabrication to appease his wife to cover his extramarital affair. Therefore, the  
2 admission of impermissible hearsay is harmful beyond a reasonable doubt.

3 Petitioner was denied an opportunity to subject Naomi and Lilly to cross-  
4 examination. She was not allowed to test the witness' recollection, to probe into the details  
5 of the alleged distribution of Czodor's naked photos, or to verify the exchanges of  
6 communication between them and Czodor so that the jury might judge for itself whether  
7 Czodor's testimony was worthy of belief. *Mattox v. United States*, 156 U. S. 237, 242-243  
8 (1895). The right of cross-examination is more than a desirable rule of trial procedure. It  
9 is implicit in the constitutional right of confrontation, and helps assure the "accuracy of  
10 the truth-determining process." *Dutton v. Evans*, 400 U. S. 74, 89 (1970); *Bruton v. United*  
11 *States*, 391 U. S. 123, 135-137 (1968). It is, indeed, "an essential and fundamental  
12 requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v.*  
13 *Texas*, 380 U. S. 400, 405 (1965). The denial or significant diminution to confront or to  
14 cross-examine calls into question the ultimate "integrity of the fact-finding process" and  
15 requires that the competing interest be closely examined. *Berger v. California*, 393 U. S.  
16 314, 315 (1969).

17 **CLAIM 26: Violation of 6th & 14th Amendments – Improper**  
18 **permitting amendment**

19 Amendment only one day before trial did not permit adequate preparation of a  
20 defense. Defendant should not be compelled to forfeit fundamental right to a speedy trial  
21 in response to the prosecution's untimely introduction of amended charges.

22 Unlike the cases cited by Respondent, holding that the murder theory revealed  
23 through the state's opening statement and jury instructions was constitutionally adequate  
24 notice, the allegations of coming within 100 yards of the protected person and the failure  
25 to deactivate and create websites are fundamentally distinct and requiring different  
26 discovery processes.

27 **CLAIM 27: SPEEDY TRIAL**

28 The state court's rejection of Petitioner's claim was contrary to or based on an

1 unreasonable application of *Barker*. ECF 33 at 74-89.

2 The government cannot show that it proceeded with reasonable diligence. ECF 33  
3 at 76-84. Public defender, prosecution and the trial court all contributed to the substantial  
4 delay that prejudiced Petitioner.

5 Public defender's assertion is entirely false that they explained Petitioner's speedy  
6 trial rights and obtained her voluntary agreement to waive them. ECF 33 at 109-110.

7 The actual restraints imposed by arrest and holding to answer a criminal charge are  
8 sufficient restraint on liberty, even without incarceration. Even without incarceration,  
9 Petitioner had been in custody 720 days prior to trial. In addition, the substantial delay  
10 caused Petitioner subject to over \$20,000 interests from restitution. See *Smith v. Hooey*,  
11 393 U.S. 374, 378, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969) (a delay in bringing a defendant  
12 to trial may create prejudice if it eliminates the possibility of serving concurrent  
13 sentences).

14 **CLAIM 28: DENIAL OF THE PETITIONER'S MOTION TO**  
15 **DISMISS**

16 As explained in Section I and II, this claim is not procedurally barred. Respondent  
17 contends that this claim is not cognizable because Petitioner fails to allege a violation of  
18 federal law. The Supreme Court has instructed the federal courts to liberally construe the  
19 "inartful pleading" of pro se litigants. *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct.  
20 700, 701, 70 L.Ed.2d 551 (1982) (per curiam).

21 Although Petitioner did not explicitly allege a violation of federal law, the  
22 substance of her claims exhibits her argument of a violation of Sixth and Fourteenth  
23 Amendments.

24 As explained in Claim 27, Petitioner's motion to dismiss should have been granted.

25 **CLAIM 29: DENIAL OF PETITIONER'S MARSDEN MOTION**

26 As explained in Section I and II, this claim is not procedurally barred.

27 Respondent contends that the trial court confirmed that counsel had conferred with  
28 Luo at length on two occasions to discuss her rights, the charges and potential

1 punishment, and trial strategy, and obtained counsel's representation that any problems  
2 stemmed only from an "impasse" over the motion to dismiss and that he could effectively  
3 represent her. However, prior to signing off the stipulation public defender never  
4 discussed with Petitioner about the stipulation which indicates a serious breakdown in  
5 communications.

6 **CLAIM 30: PROSECUTORIAL MISCONDUCT AT TRIAL**

7 As explained in Section I and II, this claim is not procedurally barred. Any failure  
8 to object in the proceedings below or to raise them on appeal was a result of ineffective  
9 assistance of counsel.

10 It will be especially sensitive to allegations of prejudice when the government's  
11 case rests on uncorroborated accomplice testimony. *United States v. Hibler*, 463 F.2d 455  
12 (9th Cir. 1972). The *Hibler* "doctrine" may be restated more generally: the defendant is  
13 more likely to be prejudiced by error or misconduct when the government has a weak  
14 case.

15 The government's case against Petitioner rested on the virtually uncorroborated  
16 testimony of Czodor. It was a weak case in which the credibility of the prosecution  
17 witnesses was a critical element.

18 If the prosecutor's remarks "prejudiced a specific right, such as the privilege  
19 against compulsory self-incrimination, as to amount to a denial of that right," the remarks  
20 are considered misconduct and the analysis of the misconduct must include case law  
21 governing the particular constitutional provision governing that right. See *Donnelly v.*  
22 *DeChristoforo*, 416 U.S. 637, 643 (1974). Here, the prosecution's unlawful introduction  
23 and misrepresentation of Petitioner's prior "compelled" testimony amount to a denial of  
24 her right against compulsory self-incrimination.

25 Courts "must consider the probable effect the prosecutor's [comments] would have  
26 on the jury's ability to judge the evidence fairly," and, where the prosecutor is attempting  
27 to respond to the defense, a court must also consider "defense counsel's conduct, as well  
28 as the nature of the prosecutor's response." *United States v. Young*, 470 U.S. 1, 12 (1985).

1 Comments that may amount to misconduct include attempts to “manipulate or misstate the  
2 evidence.” *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). Here, the prosecution’s  
3 inappropriate or inflammatory suggestions, statement of facts not in evidence, improper  
4 vouch for the prosecution witness “while at the same time withholding exculpatory  
5 evidence, and telling the jury that hey, Tomas Czodor, he's a nice guy, that's a violation of  
6 the restraining order, were not attempts to respond to the defense. Instead, they were  
7 attempts to impair the jury’s ability to judge the evidence fairly.

8 Any claim of prosecutorial misconduct must be reviewed within the context of the  
9 entire trial. *Greer v. Miller*, 485 U.S. 756, 765-66 (1987); *United States v. Weitzenhoff*, 35  
10 F.3d 1275, 1291 (9th Cir. 1994). The absence of forensic evidence, coupled with the  
11 complaining witness being the sole testifying witness, magnifies the impact of the  
12 prosecutorial misconduct on the overall fairness of the trial.

### 13 CLAIM 31: CUMULATIVE ERROR

14 In finding no cumulative error, the Orange County Superior Court identified certain  
15 legal principles and authority. However, it failed to apply any factual analysis to these  
16 laws. Namely, the superior court made no analysis at all.

17 A federal habeas court must apply the *Brecht* standard, whether or not the state  
18 appellate court recognized the error and reviewed it for harmlessness under the *Chapman*  
19 standard. *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007); *Bains v. Cambra*, 204 F.3d 964, 977  
20 (9th Cir. 2000).

21 Under the *Brecht* standard, an error is not harmless, and habeas relief must be  
22 granted, if the federal court has “grave doubt about whether a trial error of federal law had  
23 substantial and injurious effect or influence in determining the jury's verdict.” *O’Neal v.*  
24 *McAninch*, 513 U.S. 432, 436 (1995) (internal quotation marks omitted).

25 The "logical corollary" of this harmless error doctrine is that trial errors are more  
26 likely to be prejudicial to a defendant — i.e., not harmless — when the government's case  
27 on a critical element is weak. *U.S. v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).  
28 Accordingly, in determining whether the combined effect of multiple errors rendered a

1 criminal defense "far less persuasive" and had a "substantial and injurious effect or  
2 influence" on the jury's verdict, the overall strength of the prosecution's case **must be**  
3 **considered** because "a verdict or conclusion only weakly supported by the record is more  
4 likely to have been affected by errors than one with overwhelming record support."  
5 *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

6 The state court found no cumulative error simply because nearly all of petitioner's  
7 claims of error have already been considered and rejected either via direct appeal or prior  
8 petition for writ of habeas corpus. ECF 50-1 at 109. Nowhere in the record suggests that  
9 the overall strength of the prosecution's case was ever considered.

10 The fundamental question in determining whether the combined effect of trial  
11 errors violated a defendant's due process rights is whether the errors rendered the criminal  
12 defense "**far less persuasive**," *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and  
13 thereby had a "substantial and injurious effect or influence" on the jury's verdict, *Brecht v.*  
14 *Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotations omitted).

15 As a result of the prosecution's misconduct and ineffective assistance of counsel,  
16 Petitioner was prevented from presenting critical evidence to support her claim that  
17 Czodor was a compulsive liar, and her primary defense was therefore "far less persuasive  
18 than it might [otherwise] have been."

19 Coupled with the wrongful admission of inadmissible hearsay and Petitioner's  
20 compelled testimony, the jury was left with only half the picture.

21 In light of the due process principles established in *Chambers* and the starkly one-  
22 sided impact of the errors in this case, the state court's conclusion of no cumulative error  
23 was an objectively unreasonable application of clearly established due process law as  
24 determined by the Supreme Court.

25 In conclusion, Petitioner is entitled to habeas corpus relief. See *Brecht v.*  
26 *Abrahamson*, 507 U.S. 619, 623 (1993) (Holding that the "substantial and injurious effect  
27 or influence" standard, as opposed to the "harmless beyond a reasonable doubt" standard,  
28 "applies in determining whether habeas relief must be granted because of constitutional

1 error of the trial type" (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct.  
2 1239, 90 L.Ed. 1557 (1946)).

3 **CLAIM 32: IAC - DIRECT APPEAL**

4 In *Smith v. Robbins*, 528 U.S. 259, 288 (2000), the Supreme Court endorsed the  
5 analysis suggested by the Seventh Circuit in *Gray v. Greer*:

6 When a claim of ineffective assistance of counsel is based on failure to  
7 raise viable issues, the district court must examine the trial court record  
8 to determine whether appellate counsel failed to present significant and  
9 **obvious issues** in appeal. Significant issues which could have been  
10 raised should then be compared to those which were raised. Generally,  
11 only when ignored issues are clearly stronger than those presented, will  
12 the presumption of effective assistance of counsel be overcome.

13 800 F.2d 644, 646 (7th Cir. 1986).

14 In determining whether an attorney's appellate assistance was ineffective, a court  
15 must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct  
16 the circumstances of counsel's challenged conduct, and to evaluate the conduct from  
17 counsel's perspective at the time." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting  
18 *Strickland*, 466 U.S. at 689).

19 "So the -- by the rules of the restraining order, if she posted a post that said, like,  
20 hey, Tomas Czodor, he's a nice guy, that's a violation of the restraining order." ECF 4 at  
21 194-195. Appellate counsel's decision to file a non-issue brief was professionally  
22 unreasonable and prejudicial because the prosecution already identified the  
23 unconstitutionality of the restraining order which should have been struck down under  
24 federal law. *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 581 (1971). The  
25 issue was so obvious and the failure to raise the claim amounts to ineffective assistance of  
26 counsel.

27 The constitutional requirement of substantial equality and fair process can only be  
28 attained where counsel acts in the role of an active advocate in behalf of his client, as



1 opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not  
2 reach that dignity. *Anders v. California*, 386 U.S. 738, 744 (1967). The principles of  
3 *Griffin* required a State that afforded a right of appeal to make that appeal more than a  
4 "meaningless ritual" by supplying an indigent appellant in a criminal case with an  
5 attorney. *Douglas v. California*, 372 U.S. 353, 358 (1963). A meaningful appeal  
6 necessitates the identification and preservation of issues that are pertinent to the  
7 appellant's case and may impact the outcome. Appellate counsel's failure to fulfill this  
8 duty can result in a deprivation of the appellant's right to a fair and effective appellate  
9 process.

10 Appellate counsel's decision to file a *Wende* brief was ineffective assistance  
11 because the right to the aid of appellate counsel includes the right to preserve issues to  
12 avoid procedural bars. The superior court found that it was *Dixon* barred by her failure to  
13 raise her claims on direct appeal.

14 Therefore, the decision to file a *Wende* brief, without adequate consideration of  
15 potential issues and their preservation, amounts to ineffective assistance, compromising  
16 the appellant's right to a meaningful appeal. When there are potential issues that could be  
17 preserved to avoid procedural bars, appellate counsel's decision to file a *Wende* brief falls  
18 short of the required standard of effective assistance. Petitioner was prejudiced by  
19 appellate counsel's representation for his failure to preserve issues.

### 20 CLAIM 33: ACTUAL INNOCENCE

21 To be credible, an actual innocence claim requires petitioner to support her  
22 allegations of constitutional error with new reliable evidence — whether it be exculpatory  
23 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that  
24 was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The "new" evidence  
25 need not be newly available, just newly presented — that is, evidence that was not  
26 presented at trial. *Griffin v. Johnson*, 350 F.3d 956, 961 (9th Cir. 2003).

27 It is not enough that the new evidence show the existence of reasonable doubt;  
28 rather, petitioner must show "that it is more likely than not that no 'reasonable juror'

1 would have convicted him." *Schlup*, 513 U.S. at 329. As the Ninth Circuit has stated, "the  
2 test is whether, with the new evidence, it is more likely than not that no reasonable juror  
3 would have found [p]etitioner guilty." *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1084 (9th  
4 Cir. 2001). Thus, "actual innocence" means factual innocence, not merely legal  
5 insufficiency. *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (citing *Sawyer*, 505  
6 U.S. at 339).

7 In this case, no physical or forensic evidence was presented, the complaining  
8 witness is the only testifying witness, all photos and screenshots were in paper format  
9 with no metadata provided by Czodor, Czodor served a dual role of complaining witness  
10 and detective, photos of the damaged door was taken right after Czodor learned about the  
11 cost to remove a post labeling him a liar, any evidence related to the credibility of the  
12 witness is material. Had the jury heard the evidence of Czodor's marriage, contradicted  
13 statements made directly to police on September 10 and September 18, 2018, the  
14 prosecution's misrepresentation of Petitioner's compelled testimony, no reasonable juror  
15 would have convicted her.

#### 16 **CLAIM 34: Section 2254(d) Does Not Bar Relief**

17 The state superior court's rejection of Petitioner's first habeas corpus claims of  
18 ineffective assistance was based on an unreasonable determination of the facts because the  
19 court did not review the trial transcript in violation of her due process rights. While  
20 Petitioner failed to provide trial transcript, the state court could have denied her petition  
21 without prejudice. See *Valdez v. People of State of California*, 439 F.2d 1405, 1406 (9th  
22 Cir. 1971) (reversing denial of habeas corpus petition without a transcript of the state  
23 court proceedings.)

24 Without a transcript of the state court proceedings the state court was therefore  
25 unable to determine whether counsel's assistance was effective. The state court itself  
26 admitted that it did not make a meaningful analysis of Petitioner's claims. The denial of  
27 Petitioner's claims was unreasonable.

#### 28 **CLAIM 35: INCORRECT JURY INSTRUCTION**

1 The trial court, in instructing the jurors on count 2 related to the violation of a court  
2 order under California Penal Code § 273.6, included an incorrect element, not contacting,  
3 sending messages, following, or disturbing the peace of Czodor, instead of the charged  
4 element related to the failure to deactivate website and creating new websites.

5 Because of this error, it is unclear whether the jury indeed determined that the  
6 prosecution has proved beyond a reasonable doubt that Petitioner failed to deactivate  
7 website and created new websites. The incorrect jury instruction gave rise to a genuine  
8 risk that the jury would convict petitioner on the basis of texting Czodor, rather than on  
9 the failure to deactivate website and creation of new websites, a risk heightened by the  
10 fact that Czodor alleged receipt of threatening messages. The stipulation regarding  
11 restraining order did not obviate the necessity for a correct instruction in view of the  
12 particular need for it in this case. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding  
13 that the Due Process Clause requires the prosecution to prove every element of a charged  
14 offense beyond a reasonable doubt); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct.  
15 1930, 1936, 56 L.Ed.2d 468, 477 (1978) (holding that "arguments by counsel cannot  
16 substitute for instructions by the court").

17 The evidence did not conclusively establish that Petitioner failed to comply with  
18 the restraining orders. The only evidence, supporting that the nude photos and videos of  
19 Czodor posted by Petitioner remained on multiple websites even up to the time of trial,  
20 comes from Czodor's testimony instead of forensic evidence. The evidence conclusively  
21 establish that Czodor is a compulsive liar and master manipulator with a strong motive to  
22 lie.

### 23 III. EVIDENTIARY HEARING

24 The claims cannot be resolved on the existing record. The court should allow  
25 Petitioner to conduct a court room reenactment to compare the sound in the video and the  
26 actual sound of knocking and scratching on wood furniture, an issue that cannot be  
27 resolved by reference to the state court record. See *Anderson v. State of Texas*, 507 F.2d  
28 105, 106 (5th Cir. 1975) (The judgment denying habeas corpus relief must be vacated

1 because the district court acted without reviewing petitioner's state trial transcript and did  
2 not hold an evidentiary hearing.)

3 **IV. CERTIFICATE OF APPEALABILITY**

4 If a court denies a habeas petition, the court may only issue a certificate of  
5 appealability "if jurists of reason could disagree with the district court's resolution of his  
6 constitutional claims or that jurists could conclude the issues presented are adequate to  
7 deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v.*  
8 *McDaniel*, 529 U.S. 473, 484 (2000). Although the petitioner is not required to prove the  
9 merits of his case, he must demonstrate "something more than the absence of frivolity or  
10 the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at 338.

11 In the event that the court denies relief, Petitioner respectfully requests a Certificate  
12 of Appealability because her petition is pursued with good faith without frivolity.

13 **V. CONCLUSION**

14 For the reasons stated above, Petitioner respectfully requests an evidentiary hearing  
15 and her petition be granted. In the event the court denies the petitioner, Petitioner requests  
16 a certificate of appealability be issued.

17  
18 Respectfully submitted,

19 Date: January 19, 2024

20 /s/ Xingfei Luo  
21  
22  
23  
24  
25  
26  
27  
28

**DECLARATION OF XINGFEI LUO**

I, XINGFEI LUO, declare and state:

1. I am the petitioner in this petition. I have personal knowledge of all facts stated herein. If called as a witness, I could and would competently testify thereto.

2. I was born and raised in a foreign country in which English is not an official language. I did not attend any school in the United States. Nor did I receive any legal training in this country.

3. As a brief overview of the timeline, I was convicted by a jury on July 29, 2021. ECF 3 at 177-179. Despite facing the challenges of being a non-English speaker and navigating the legal process without the assistance of counsel and prior legal training, I promptly filed my first state habeas petition (case no. M-19285) on October 13, 2021, within a mere 76 days after the wrongful conviction before the trial transcript was produced. ECF 5 at 9.

4. This prompt filing is indicative of my conscientious efforts to present all claims, both factual and legal, that were reasonably known to me at that time. The constraints of language and the absence of legal representation and prior legal training did not deter me from diligently articulating the pertinent issues within my capacity and the given timeframe.

5. While I faced inherent challenges in comprehending and navigating the legal intricacies, making the expeditious filing all the more commendable, the swift submission of the first state habeas petition reflects my commitment to securing a fair and just resolution in a timely manner.

6. During the entire state and federal habeas corpus proceedings, I have not received any legal or professional assistance.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing is true and correct.

Executed in Los Angeles, CA on January 19, 2024.

/s/ XINGFEI LUO

**CERTIFICATE OF SERVICE**

I declare that I electronically filed the forgoing with the United States District Court, Central District of California. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

In addition, I electronically served the forgoing to the following email address:

[michael.butera@doj.ca.gov](mailto:michael.butera@doj.ca.gov)

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing is true and correct.

Executed on January 19, 2024

/s/ XINGFEI LUO

XINGFEI LUO, In Pro Per